

United States
Circuit Court of Appeals

For the Ninth Circuit.

Vol
2261

PEVELY DAIRY COMPANY, a corporation,
Appellant,

vs.

BORDEN PRINTING COMPANY, a corporation,
Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 324

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division

FILED

MAR 19 1941

PAUL P. O'BRIEN,
CLERK

No. 9744

United States
Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Defendant
and Appellee.

In the United States District Court, Northern District of California, Southern Division

In Equity No. 4295-R.

Patent No. 1,829,915

Patent No. 1,999,011

Patent No. 1,923,856

PEVELY DAIRY COMPANY,
a Corporation,

Plaintiff,

v.

BORDEN PRINTING COMPANY,
a Corporation,

Defendant.

BILL OF COMPLAINT

Plaintiff complains of the defendant and alleges:

1.

That the plaintiff is a corporation of the State of Missouri, having its principal office and place of business at the City of St. Louis, Missouri;

2.

That the defendant is a corporation organized under and existing by virtue of the laws of the State of California, and that the defendant has a regular and established place of business in the City of San Francisco, State of California;

3.

(a) That jurisdiction of this Court is based upon the patent laws of the United States;

(b) That the acts of infringement hereinafter complained of were and are being committed in the City of San Francisco, State of California, within this District, and elsewhere in the United States.

[1*]

4.

(a) That on December 18, 1930, Joseph J. Wasser, being within the meaning of the statutes of the United States then in force, the original, first and sole inventor of a certain "Display Device," and being entitled to a patent thereon, under the provisions of the said statutes, duly filed in the United States Patent Office an application for Letters Patent Serial No. 503,143, for said invention;

(b) That on November 3, 1931, the said Joseph J. Wasser having assigned his entire right, title and interest in and to the said application for United States Letters Patent to the plaintiff, the Pevely Dairy Company, and all of the requirements of the then existing statutes of the United States and Rules of Practice of the United States Patent Office having been complied with, Letters Patent of the United States No. 1,829,915 were duly granted to the said plaintiff on said application Serial No. 503,143, which Letters Patent, or a certified copy thereof, the plaintiff will produce as this Court may direct, and a copy of which Letters Patent is attached hereto and marked "Exhibit A";

(c) That on August 17, 1933, Joseph J. Wasser, being within the meaning of the statutes of the

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States then in force, the original, first and sole inventor of a certain "Display Device," and being entitled to a patent thereon, under the provisions of the said statutes, duly filed in the United States Patent Office an application for Letters Patent Serial No. 585,594, for said invention;

(d) That on April 23, 1935, the said Joseph J. Wasser having assigned his entire right, title and interest in and to the said application for United States Letters Patent to the plaintiff, the Pevely Dairy Company, and all of the requirements of the then existing statutes of the United States and Rules of Practice of the United States Patent Office having been complied [2] with, Letters Patent of the United States No. 1,999,011 were duly granted to the said plaintiff on said application Serial No. 685,594, which Letters Patent, or a certified copy thereof, the plaintiff will produce as this Court may direct, and a copy of which Letters Patent is attached hereto and marked "Exhibit B";

(e) That on January 14, 1929, Joseph J. Wasser, being within the meaning of the statutes of the United States then in force, the original, first and sole inventor of a certain "Display Device," and being entitled to a patent thereon, under the provisions of the said statutes, duly filed in the United States Patent Office an application for Letters Patent Serial No. 332,258, for said invention;

(f) That on August 22, 1933, the said Joseph J. Wasser, having assigned his entire right, title and interest in and to the said application for United States Letters Patent to the plaintiff, the Pevely

Dairy Company, and all of the requirements of the then existing statutes of the United States and Rules of Practice of the United States Patent Office having been complied with, Letters Patent of the United States No. 1,923,856 were duly granted to the said plaintiff on said application Serial No. 332,258, which Letters Patent, or a certified copy thereof, the plaintiff will produce as this Court may direct, and a copy of which Letters Patent is attached hereto and marked "Exhibit C";

(g) That the entire right, title and interest in and to the above referred to United States Letters Patent Nos. 1,829,915, 1,999,011, and 1,923,856 have always been and now are vested in the said plaintiff, the Pevly Dairy Company;

5.

That the defendant has, within the last six years and prior to the filing of this bill of complaint, and subsequent to the dates of said Letters Patent, or any of them, infringed the said Letters Patent and threatens to continue to so infringe by [3] *by* making or causing to be made, selling or causing to be sold and using or causing to be used, within this district and elsewhere within the United States, display devices made in accordance with and embodying the inventions disclosed and claimed in plaintiff's said Letters Patent, or any thereof, wilfully and without the consent of the plaintiff;

6.

That the plaintiff has notified the defendant in writing of said Letters Patent and of the defend-

ant's infringement thereof, but in spite of said notice said defendant is continuing such infringement;

7.

That the defendant has derived unlawful gains and profits from such infringement which the plaintiff would otherwise have received but for such infringement, and plaintiff has thereby been caused irreparable damage;

8.

That after due trial claims 4 and 5 of Letters Patent No. 1,829,915 and the claim of Letters Patent No. 1,999,011 were decreed valid and infringed in the final determination of the case of *Pevely Dairy Company v. The Wolf Envelope Company*, Equity No. 5251, United States District Court, Northern District of Ohio, Eastern Division, decision, not reported; and,

9.

That in the following controversies consent decrees were entered in favor of the plaintiff decreeing Letters Patent No. 1,829,915 valid and infringed:

Pevely Dairy Company v. Mitchell S. Manhard, Equity 3956-L, U. S. D. C., N. D. Cal., S. Div. [4]

Pevely Dairy Company v. Golden State Co., Ltd., Equity 3728-K, U. S. D. C., N. D. Cal., S. D.; and,

Pevely Dairy Company v. Rusling Wood, Inc., Equity 76-203, U. S. D. C., S. D. N. Y.

Plaintiff therefore prays:

10.

For a perpetual and preliminary injunction restraining the defendant, its officers, agents, servants and employees from directly or indirectly making or causing to be made, selling or causing to be sold, or using or causing to be used, any display devices made in accordance with or embodying the inventions of the said United States Letters Patent No. 1,829,915, 1,999,011, and 1,923,856, or any of them, or from infringement upon or violating the said Letters Patent, or either of them, in any way whatsoever;

11.

For the costs and an accounting of profits and damages; and,

12.

For such other and further relief as the Court may deem meet and just.

PEVELY DAIRY COMPANY,
By DANIEL C. KERCKHOFF,
President.

BOYKEN, MOHLER & GORDON,
Solicitors for Plaintiff.

LAWRENCE C. KINGSLAND,
EDMUND C. ROGERS,
ESTILL E. EZELL,
Of Counsel. [5]

State of Missouri,
City of St. Louis—ss.

Daniel C. Kerckhoff, being duly sworn, states that he is the president of Pevely Dairy Company, a corporation, the plaintiff named in the foregoing bill of complaint; that he knows the contents thereof and that the same is true according to the best of his knowledge, information and belief.

DANIEL C. KERCKHOFF.

Subscribed and sworn to before me July 1, 1938.

My Commission expires: April 22, 1940.

J. J. WASSER,

Notary Public.

[Endorsed]: Filed July 26, 1938. [6]

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Now comes the defendant in the above-entitled cause, and moves this Honorable Court for an order requiring plaintiff to furnish a Bill of Particulars stating the following facts, and a further and better recital of the nature of the claim of [7] plaintiff stated in the Bill of Complaint herein on file, pursuant to Equity Rule 20, namely:

I.

States which claim or claims of each of the patents sued on plaintiff will contend defendant infringes.

II.

State precisely what plaintiff will aver or claim is new or patentable in each of the claims of the following patents: (a) Patent Number 1,829,915, (b) Patent Number 1,999,011, (c) Patent Number 1,923,856.

III.

State precisely where in each of defendant's devices alleged to infringe said Letters Patent Number 1,829,915 there is found the features set forth as new and patentable in response to interrogatory Two (2) hereof and in that connection plaintiff is required to,

(a) Point out by reference characters applied to a specimen, drawing or cut of defendant's alleged infringing device or devices, the elements of each of the claims relied on in Letters Patent Number 1,829,915 alleged to be infringed; and

(b) Point out by reference characters applied to a specimen, drawing or cut of defendant's device alleged to infringe Letters Patent Number 1,829,915 the features set forth as new and patentable in response to interrogatory Two (2) above.

IV.

State precisely where in each of defendant's devices alleged to infringe said Letters Patent Number 1,999,011 [8] there is found the features set forth as new and patentable in response to interrogatory Two (2) hereof and in that connection plaintiff is required to,

(a) Point out by reference characters applied to a specimen, drawing or cut of defendant's alleged infringing device or devices, the elements of each of the claims relied on in Letters Patent Number 1,999,011 alleged to be infringed; and

(b) Point out by reference characters applied to a specimen, drawing or cut of defendant's device alleged to infringe Letters Patent Number 1,999,011 the features set forth as new and patentable in response to interrogatory Two (2) above.

V.

State precisely where in each of defendant's devices alleged to infringe said Letters Patent Number 1,923,856 there is found the features set forth as new and patentable in response to interrogatory Two (2) hereof and in that connection plaintiff is required to,

(a) Point out by reference characters applied to a specimen, drawing or cut of defendant's alleged infringing device or devices, the elements of each of the claims relied on in Letters Patent Number 1,923,856 alleged to be infringed; and

(b) Point out by reference characters applied to a specimen, drawing or cut of defendant's device alleged to infringe Letters Patent Number 1,923,856 the features set forth as new and patentable in response to interrogatory Two (2) above. [9]

VI.

If plaintiff bases its right and title to the several patents in suit on the alleged Assignments referred

to in Paragraph 4, subdivisions b, d, and f, on pages 2 and 3 of the Bill of Complaint, then furnish defendant and file with the Court true copies of said Assignments.

VII.

Furnish defendant with and file with the Court true copies of the decision, findings and decree in the case of Pevely Dairy Company v. The Wolf Envelope Company, referred to in paragraph 8, page 4 of the Bill of Complaint and in this regard furnish defendant with a file of the Court specimens of defendant's device or devices in issue in said case.

VIII.

State precisely the following in relation to the consent decrees set forth in paragraph 9, pages 4 and 5 of the Bill of Complaint, (a) Did defendants obtain a license in said patent in suit? If so, furnish defendant and file with the Court a copy of said license.

(b) What consideration, if any, was paid for said license?

(c) Furnish defendant with and file with the Court specimens or drawings of the structures involved in said suits. [10]

On the hearing of said Motion defendant will use, rely upon and read from the pleadings and papers on file herein, and on the authorities set forth below:

Paraffine Co's v. Wieland, 17 Fed. (2nd)

992; and the therein recited authorities;

Wilson v. Union Tool Co., 275 Fed. 624, and the therein recited authorities;

Mueller v. Scranton Glass Co., 14 Fed. (2nd) 120, and the therein recited authorities; Hopkins' Federal Equity Rules, (6th Edition), pages 160, 161, 162 and 163.

CHAS. E. TOWNSEND,

ROY C. HACKLEY,

Attorneys for Defendant.

Dated: September 21, 1938.

Service of copy of the above Motion For Bill of Particulars admitted this 21st day of September, 1938.

BOYKEN, MOHLER & GORDON,

Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 21, 1938. [11]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR PARTICULARS.

In order fully and properly to supply, to the best of its ability, Particulars sought by defendant in a motion filed on or about September 26, 1938, plaintiff requests further particulars to be supplied by defendant according to Rule 12 (e), as follows:

[12]

1.

There are hereto annexed outlines of two display devices, designated as Plaintiff's Exhibits 3 and 4.

As to each of them, state whether it represents a collar made by defendant.

2.

Supply a representation of all other display devices consisting of circular bands adapted to fit over the neck of a bottle, made or used by the defendant within six years of the filing of the bill of complaint.

3.

(a) As to Exhibits 3 and 4, separately indicate whether or not, when their ends are united for installation on a bottle, any freedom of movement of the connected ends is attained whereby the size of the upper opening may be altered during passage of the collar over the bottle flange or its seating on the bottle neck.

(b) If the answer to (a) hereof is in the negative, give reasons.

4.

(a) As to Exhibits 3 and 4, separately indicate whether or not either has a notch at one end and a tab at the other, the tab having an overhanging shoulder portion insertable in the notch to latch, but with the tab received in the notch sufficiently loosely to enable increase in the size of the upper diameter.

(b) If the answer to (a) hereof is in the negative, give reasons.

5.

(a) As to Exhibits 3 and 4, state separately whether or not either has a notch at one end and a

tab at the other shaped to permit swinging movement of the ends when joined to permit enlargement of the upper diameter of the cone.

(b) If the answer to (a) hereof is in the negative, give reasons. [13]

6.

(a) As to Exhibits 3 and 4, state separately whether or not either of them has its ends immovably connected.

(b) If the answer to (a) hereof is in the negative, give reasons.

7.

Supply separately the information sought in Items 3, 4, 5, and 6 hereof to any other display devices produced in response to Item 2.

BOYKEN, MOHLER & GORDON,
Solicitors for Plaintiff.

Dated: November 7th, 1938.

[Endorsed]: Filed Nov. 10, 1938.

Plaintiff's Exhibits 3 and 4 are the same as Plaintiff's Exhibits 3 and 4 transmitted to this Court as physical exhibits. [14]

[Title of District Court and Cause.]

ORDER.

Plaintiff's Motion for Particulars, defendant's Motion to Strike and defendant's Motion for Bill of Particulars having come on regularly to be heard, it is hereby Ordered:

(1) Defendant's Motion to Strike is hereby denied without prejudice to the renewal thereof at the time of the [15] trial of this cause.

(2) Plaintiff's Motion for Particulars is granted as to item 1 thereof and is granted as to item 2 thereof, in so far as it is construed to call upon defendant to furnish to plaintiff specimens of all specific types of bottle hangers or bottle neckbands having the end locking means manufactured by defendant prior to the filing of the Bill of Complaint herein. Defendant shall furnish the foregoing particulars ordered hereunder within ten (10) days from the date hereof.

Plaintiff's Motion for Particulars is denied as to items 3, 4, 5, 6 and 7 thereof.

(3) Defendant's Motion for Bill of Particulars is granted as to all items thereof, with the condition that plaintiff shall furnish the requested particulars within fifteen (15) days after defendant has responded to the foregoing order relating to plaintiff's Motion for Particulars.

(Sgd.) MICHAEL J. ROCHE,
United States District Judge.

The entry of the foregoing Order is stipulated by the parties hereto acting through their respective counsel.

BOYKEN, MOHLER &
GORDON,

Attorneys for Plaintiff.

TOWNSEND & HACKLEY,
ROY C. HACKLEY, JR.,

Attorneys for Defendant.

Dated: March 25, 1939.

[Endorsed]: Filed March 27, 1939. [16]

[Title of District Court and Cause.]

DEFENDANT'S PARTICULARS

I.

Answer to Particular No. I:

Yes.

II.

Answer to Particular No. II:

The three specific types of locks, employed on bottle collars manufactured by defendant prior to the filing of [17] the Bill of Complaint herein, are shown in Exhibits "A", "B" and "C", attached hereto.

BORDEN PRINTING COMPANY

(Sgd.) CHAS. E. TOWNSEND,

(Sgd.) ROY C. HACKLEY, JR.,

Its Attorneys.

Exhibits A, B and C annexed to this bill of particulars correspond to Plaintiff's Exhibits 3, 4 and 5, respectively, transmitted to this Court as physical exhibits.

Admission of Service.

[Endorsed]: Filed April 14, 1939. [18]

[Title of District Court and Cause.]

PLAINTIFF'S PARTICULARS.

Now comes the plaintiff and, in accordance with the Court's order of March 25, 1939, makes answer to the defendant's Bill of Particulars, employing corresponding paragraph numbers for clarity: [19]

I.

Patent No. 1,829,915—claims 4-11;

Patent No. 1,999,011—claims 1-3;

Patent No. 1,923,856—the claim.

II.

The plaintiff avers that the following combinations of elements in Patents Nos. 1,829,915, 1,999,011, and 1,923,856 as particularly identified by patent and claim numbers are new and patentable:

Patent No. 1,829,915:

Claim 4:

“A display device for application to a bottle having a cylindrical body portion, a tapered neck portion defining an enlarged mouth, and

an enlarged top flange; said device comprising

- (1) an arcuate piece of pliable material adapted to be formed into a truncated conical member having
 - (a) a lower diameter approximately equal to the diameter of the body portion of the bottle and
 - (b) an upper diameter approximately equal to an intermediate diameter of the tapered neck portion of the bottle, and
- (2) means for so connecting the ends of said arcuate piece as
 - (a) to hold the same in the form of the truncated conical member and
 - (b) permitting enlargement of the upper diameter of the member."

[20]

* * * * *

Claim 7:

"A truncated cone band for milk bottles

- (1) formed from an arc shaped blank provided with
 - (a) a tab at one end and
 - (b) a notch at the opposite end,
 - (c) the relative shapes of the notch and tab permitting a swinging motion between the respective ends when joined so as to permit an enlargement of the diameter on the small end of the cone."

Claim 8:

“A display device for use on a milk bottle having a cylindrical body and a tapered upper portion comprising

(1) an arcuate piece of pliable material in hollow truncated form and having

(a) a diameter at its lower end approximately equal to the diameter of the bottle for which the device is intended and having

(b) a diameter at its upper end approximately equal to an intermediate portion of the tapered upper end of the bottle for which the device is intended,

(c) whereby said device will be supported on the lower end of the tapered portion of the bottle in a position in which the lower edge of said device is approximately at the upper end of the cylindrical body of the bottle, and [22]

(2) relatively movable interlocking means

(a) connecting the end portions of said piece of material together and

(b) permitting enlargement of the upper diameter of the device.”

[23]

*

*

*

*

*

Claim 11:

“A display device comprising

- (1) a flat section of pliable material
 - (a) having its upper end lower edges curving,
 - (b) said flat section being adapted to be rolled into tapered form with ends overlapping and having the upper and [24] lower edges respectively of the overlapping portions of said ends approximately even with each other, and
- (2) means integral with one end interlocking with the other end of said section and pivotally connecting said relationship, whereby the smaller end of the device may enlarge to permit said device to be passed onto a support.”

Patent No. 1,999,011: [25]

* * * * *

Claim 3:

“A display device for application to a bottle having a cylindrical body portion, a tapered neck, and an enlarged top flange, said device comprising

- (1) an arcuate piece of pliable material adapted to be formed into a truncated cone by overlapping the ends and having

- (a) a lower diameter approximately equal to the body portion of the bottle and
 - (b) an upper diameter approximately equal to the top flange of the bottle,
 - (c) the wall of the cone being so shaped that when the lower edge of the device is concentric with the longitudinal axis of the bottle portions the upper edge of the [26] device will be located different places from said axis, and
- (2) means for immovably connecting the overlapping ends of the piece of material." [27]

* * * * *

III.

The parenthetical characters below indicate the respective matter found in Section II supra. The opposed characters are references from the indicated exhibit of the plaintiff.

(a) This answer is the same as the answer in Sub Section (b) hereof and attention is, therefore, directed thereto.

(b) Patent No. 1,829,915:

Claim 4:

Defendant's Collar, Def.'s Ex. A		Defendant's Collar, Def.'s Ex. B	
Sec. II, supra	Pl.'s Ex. 5	Sec. II, supra	Pl.'s Ex. 6
(1)	— 5	(1)	—15
(a)	— 6	(a)	—16
(b)	— 7	(b)	—17
(2)	— 8, 9	(2)	—18, 19
(a)	— 8, 9	(a)	—18, 19
(b)	— 8, 9	(b)	—18, 19
*	*	*	*

[28]

Claim 7:

Defendant's Collar, Def.'s Ex. A		Defendant's Collar, Def.'s Ex. B	
Sec. II, supra	Pl.'s Ex. 5	Sec. II, supra	Pl.'s Ex. 6
(1)	— 5	(1)	—15
(a)	— 9	(a)	—19
(b)	— 8	(b)	—18
(c)	— 8, 9	(c)	—18, 19

Claim 8:

Defendant's Collar, Def.'s Ex. A		Defendant's Collar, Def.'s Ex. B	
Sec. II, supra	Pl.'s Ex. 5	Sec. II, supra	Pl.'s Ex. 6
(1)	— 5	(1)	—15
(a)	— 6	(a)	—16
(b)	— 7	(b)	—17
(c)	—so supported	(c)	—so supported
(2)	— 8, 9	(2)	—18, 19
(a)	— 8, 9	(a)	—18, 19
(b)	— 8, 9, 7	(b)	—18, 19, 17
*	*	*	*

[29]

III. (Insert)

(b) Patent No. 1,829,915:

Claim 4:

Defendant's Collar, Def.'s Ex. C		Defendant's Collar, Def.'s Ex. C	
Sec. II, supra	Pl.'s Ex. 7	Sec. II, supra	Pl.'s Ex. 7
(1)	—25	(1)	—25
(a)	—26	(a)	—26
(b)	—27	(b)	—27
(2)	—28, 29	(c)	—so supported
(a)	—28, 29	(2)	—28, 29
(b)	—28, 29, 27	(a)	—28, 29
		(b)	—28, 29, 27
*	*	*	*

[30]

Claim 11:

Defendant's Collar, Def.'s Ex. A		Defendant's Collar, Def.'s Ex. B	
Sec. II, supra	Pl.'s Ex. 5	Sec. II, supra	Pl.'s Ex. 6
(1)	— 5	(1)	—15
(a)	— 6, 7	(a)	—16, 17
(b)	— 5, 6, 7	(b)	—15, 16, 17
(2)	— 8, 9, 7	(2)	—18, 19, 17

The connections of collars like Defendant's Exhibits A and B have been construed as pivotal. However, if these connections be construed as fixed, then claims of Patent No. 1,999,011 clearly apply, attention being directed to Section IV, *infra*.

IV.

(a) This answer is the same as the answer in Sub Section (b) hereof and attention is, therefore, directed thereto.

(b) Patent No. 1,999,011: [31]

* * * * *

Claim 3:

Defendant's Collar, Def.'s Ex. A		Defendant's Collar, Def.'s Ex. B	
Sec. II, supra	Pl.'s Ex. 5	Sec. II, supra	Pl.'s Ex. 6
(1)	— 5	(1)	—15
(a)	— 6	(a)	—16
(b)	— 7	(b)	—17
(c)	— 5, 6, 7	(c)	—15, 16, 17
(2)	— 8, 9	(2)	—18, 19
*	*	*	*

VI.

The assignments referred to in Paragraph 4, subdivisions (b), (d), and (f) on pages 2 and 3 of the bill of complaint, are attached hereto as Plaintiff's Exhibits 8, 9, and 10, respectively.

VII.

The decree and the findings in the *Pevely Dairy Company v. The Wolf Envelope Company* case are attached hereto as Plaintiff's Exhibits 11 and 12, respectively. There was no recorded decision.

Tracings of the specimens of the defendant, *Wolf Envelope Company's* devices are attached hereto as Plaintiff's Exhibits 13, 14, 15, and 16. [32]

VIII.

(a) No.

(b)

(c) A tracing of the structure involved in the case of *Pevely Dairy Company v. Rusling Wood, Inc.*, is attached hereto as Plaintiff's Exhibit 17. The defendant's attorney is directed to the Wood patent No. 1,793,348.

Tracings of the structures involved in the case of Pevely Dairy Company v. Mitchell S. Manhard are attached hereto as Plaintiff's Exhibits 18, 19, and 20. The defendant's attorney is directed to the Manhard Patent No. 1,899,284.

The case of Pevely Dairy Company v. Golden State Company, Ltd., was erroneously inserted in the bill of complaint as a consent decree and this subject matter will be deleted.

Respectfully submitted,

BOYKEN, MOHLER & GORDON,

Solicitors for Plaintiff.

Dated April 27, 1939.

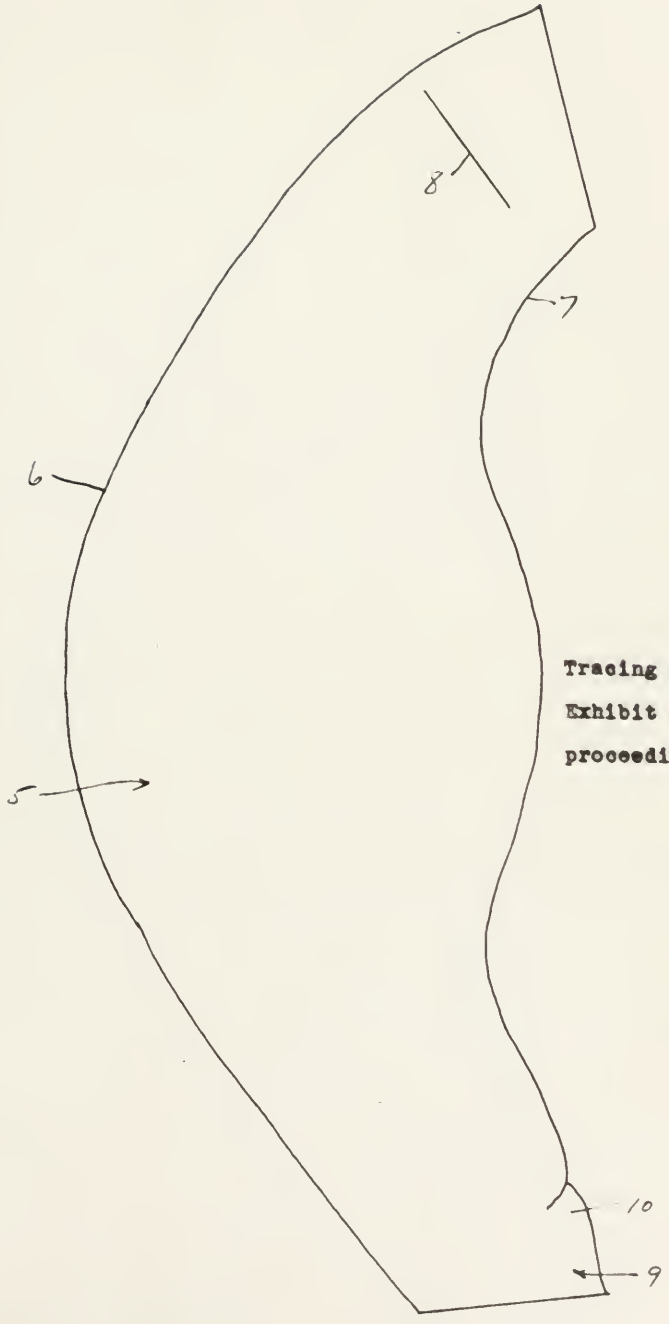
LAWRENCE C. KINGSLAND,

EDMUND C. ROGERS,

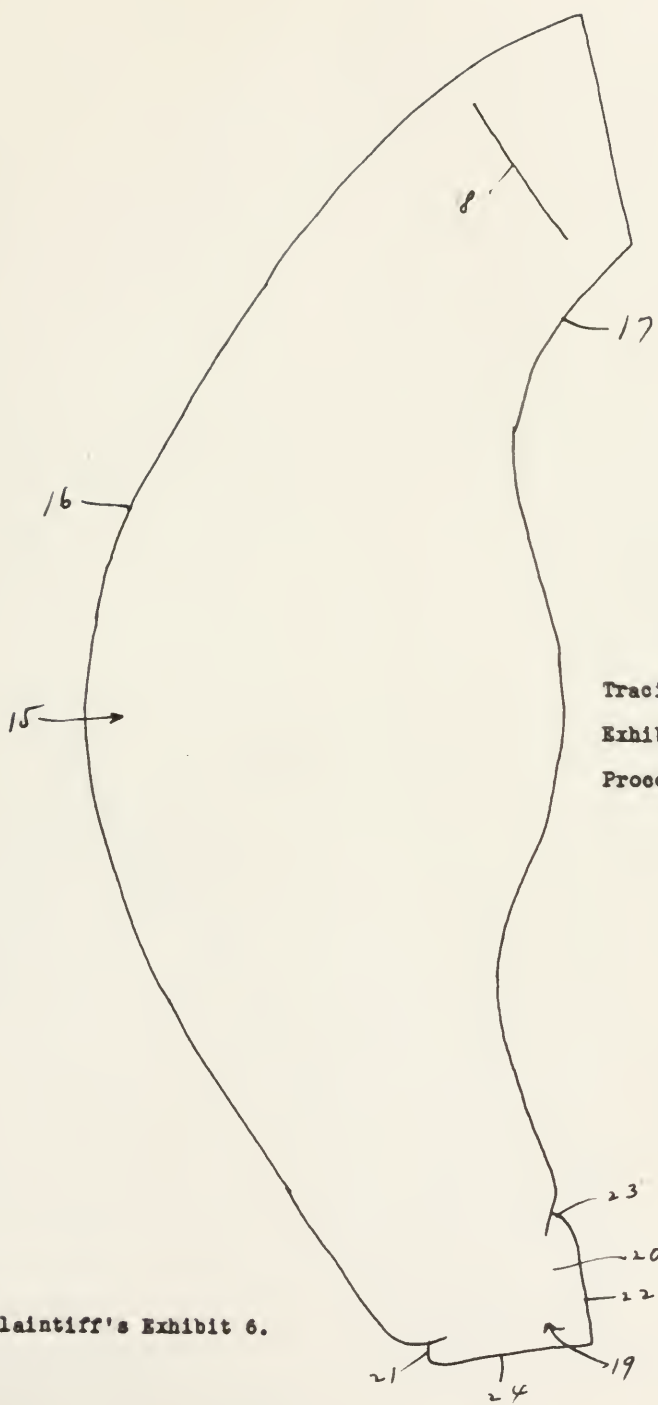
ESTILL E. EZELL,

Of Counsel.

(Admission of Service) [33]

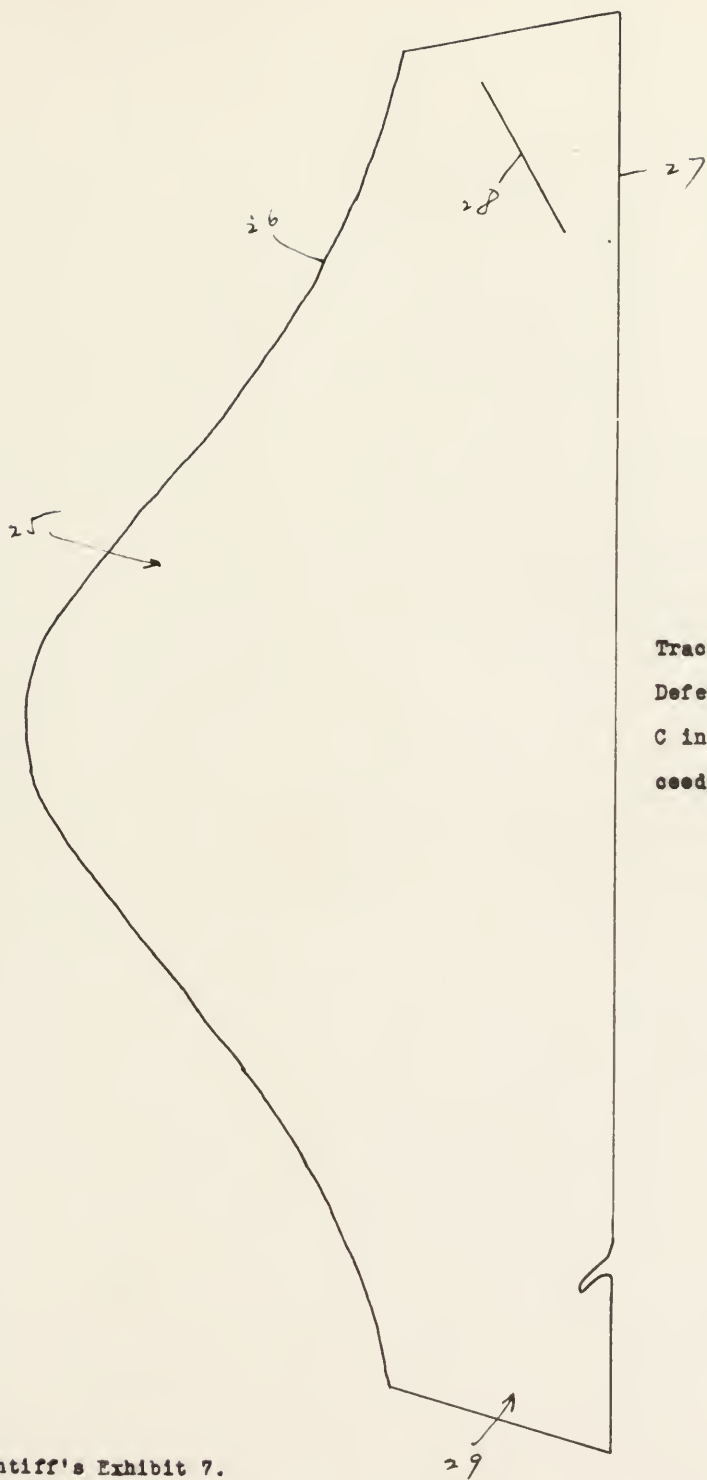


Tracing of Defendant
Exhibit A in these
proceedings.



Tracing of Defendant
Exhibit B in these
Proceedings.

Plaintiff's Exhibit 6.



Tracing of
Defendant's Exhibit
C in these pro-
ceedings.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT.

The plaintiff, Pevely Dairy Company, brings this Supplemental Complaint against the defendant, Borden Printing Company.

Plaintiff reiterates its original Bill of Complaint and incorporates the same herewith by reference.

Plaintiff further is informed and believes, and, there- [68] *therefore*, avers as follows:

1.

Since the filing of said original Bill of Complaint the defendant has unlawfully, and without license, infringed said letters patent, No. 1,999,011, and the plaintiff's rights thereunder by making, using, and selling within this District and elsewhere in the United States, display devices represented herein as exhibits 21 and 22, and hereto annexed; and defendant threatens to continue said infringement to the irreparable and continuing damage of the plaintiff.

Wherefore plaintiff demands a perpetual injunction against further infringement by defendant, those controlled by defendant, an accounting for profits and damages, and an assessment of costs against defendant because of the use of said ex-

hibits 21 and 22, and of all similar devices not colorably different therefrom.

PEVELY DAIRY COMPANY,
By LAWRENCE C. KINGSLAND,
Attorneys.
BOYKEN, MOHLER &
GORDON,
Solicitors for Plaintiff.

(Admission of Service)

[Endorsed]: Filed July 14, 1939. [69]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR SECOND
BILL OF PARTICULARS.

1.

In connection with Paragraph XVIII of the Answer, and with regard to each of the devices accused in this suit and each of the claims upon which they are accused, state which elements of the claims it is contended find no response in the said accused structures. [70]

2.

Specify and describe or identify, and in each case, connect the same with the plaintiff company, the allegedly:

- (a) false and malicious advertising, and supply copies of the same, and
- (b) the unfair trade practices, and
- (c) false claims as to the scope of the alleged patent monopoly said to have been made by the plaintiff.

3.

Supply a copy of every bottle collar made, used, or sold by defendant referred to, not already in this case; and state in connection with each bottle collar made, used, or sold by defendant (whether already in the case or not) the date when first made, sold, used, or offered for sale by defendant.

4.

In connection with Paragraph XVII of the Answer, state the geographical extent of defendant's sales of bottle collars; and as to any sold or used outside of San Francisco, California, state the first dates of each of such sales outside said city.

5.

In connection with Paragraph XVIII of the Answer, state how many bottle collars of each kind defendant has sold (a) prior to the filing of the Bill of Complaint herein, and (b) since filing of said bill.

6.

(a) With regard to Paragraphs XIX et al., state in what way the plaintiff company has harassed or threatened defendant's customers giving the circumstances alleged to connect the plaintiff, Pevely Dairy Company, with any such harassment or threat. [71]

(b) Set forth in detail the allegedly untrue statements said to have been made by the plaintiff's agents concerning defendant's financial standing;

and either identify said agents or specify their connections with the plaintiff company.

(c) State to which one of defendant's customers said allegedly untrue statements were made.

(d) State what kind of lawsuits are alleged to have been threatened against customers or prospective customers of the defendant by the plaintiff; identify the representatives of the plaintiff who made such representations, or define their connections with the plaintiff, and identify the alleged or prospective customers against whom said threats are alleged to have been made.

7.

In connection with Paragraph XX of the Answer, identify the prospective customers alleged to have been dissuaded from buying defendant's bottle collars, and identify what allegedly unjustified or improper statements were made to them by plaintiff, which statements are alleged to have prevented defendant's making such sales.

8.

Supply a list of defendant's prices for the accused devices current at:

- (a) the time of filing of the Bill of Complaint, and
- (b) the time of the unfair acts of trade alleged in the Set-off, Counterclaim and Cross-Complaint.

BOYKEN, MOHLER & GORDON,
Solicitors for Plaintiff.

Dated: July 11th, 1939.

Service of copy of the above Plaintiff's Motion for Second Bill of Particulars acknowledged this 11th day of July, 1939.

TOWNSEND & HACKLEY,
Attorneys for Defendant.

[Endorsed]: Filed July 13, 1939. [72]

[Title of District Court and Cause.]

PLAINTIFF'S SECOND BILL OF
PARTICULARS

Now comes Pevely Dairy Company, plaintiff herein, and files this voluntary bill of particulars herein, applicable to plaintiff's Exhibits 21 and 22 accused in the Supplemental Complaint. [73]

1.

Exhibits 21 and 22 infringe claim 3 of letters patent No. 1,990,011.

2.

Referring to the analysis of said claim 3 found on page 8 of plaintiff's first Bill of Particulars, and to Exhibits 21 and 22 as numbered, plaintiff alleges that Exhibits 21 and 22 infringe said claim as follows:

Elements of Claim 3	Elements of Exhibit 21	Element of Exhibit 22
(1)	35	42
(a)	36 (when ends attached)	43 (when ends attached)
(b)	37	44
(c)	38 (when ends attached)	45 (when ends attached)
(2)	39, 40	46, 47

BOYKEN, MOHLER & GORDON,
Solicitors for Plaintiff.

(Admission of Service)

[Endorsed]: Filed July 13, 1939. [74]

[Title of District Court and Cause.]

ORDER RE PLAINTIFF'S MOTION FOR
PLAINTIFF'S SECOND BILL OF PAR-
TICULARS.

Upon the stipulation of the parties below appearing, it is Ordered, with reference to Plaintiff's Motion for Plaintiff's Second Bill of Particulars filed herein on or about July 13, 1939, as follows:

[75]

(1) Items 2-a, 2-b, 3, 4, 5-a, 6-b, 6-c, 6-d and 7 shall be answered at the time below provided.

(2) Items 1, 2-c, 5-b, 6-a and 8 shall be denied.

It is further Ordered That the said particulars be furnished on or before August 15, 1939, and that plaintiff have fifteen (15) days from and after the

receipt thereof within which to reply to or move against the defendant's counterclaim herein.

MICHAEL J. ROCHE,
United States District Judge.

The entry of the foregoing Order is hereby stipulated by the parties acting by and through their respective counsel.

BOYKEN, MOHLER & GORDON,
Attorneys for Plaintiff.
TOWNSEND & HACKLEY,
Attorneys for Defendant.

Dated: July 28th, 1939.

[Endorsed]: Filed Jul. 31, 1939. [76]

[Title of District Court and Cause.]

ANSWER TO BILL OF COMPLAINT AND
SUPPLEMENTAL COMPLAINT.

Comes now the defendant, Borden Printing Company, a corporation, and for its answer to the Bill of Complaint and [77] Supplemental Complaint herein, admits, denies and avers as follows:

I.

Answering Paragraph 1 of the Bill of Complaint, defendant has not sufficient information to enable it otherwise to answer the allegations therein contained and, therefore, denies each and every allegation thereof.

II.

Answering Paragraph 2 of the Bill of Complaint, defendant admits that it is a corporation organized and existing under and by virtue of the laws of the State of California, and admits that defendant has a regular and established place of business in the City and County of San Francisco, State of California.

III.

Answering Paragraph 3 of the Bill of Complaint, defendant admits that the jurisdiction of this court is based upon the Patent Laws of the United States.

As to the other allegations contained in Paragraph 3 of the Bill of Complaint, defendant denies each and every, all and singular thereof; and denies that any acts of infringement were or are being committed in the City and County of San Francisco, State of California, within this district or elsewhere in the United States.

IV.

Answering Paragraph 4 of the Bill of Complaint, defendant denies each and every, all and singular the allegations thereof and leaves plaintiff to strict proof thereof.

V.

Defendant denies each and every, all and singular the allegations of Paragraph 5 of the Bill of Complaint herein. [78]

VI.

Defendant denies each and every, all and singular of the allegations of Paragraph 6 of the Bill of

Complaint herein and leaves plaintiff to strict proof thereof.

VII.

Defendant denies each and every, all and singular of the allegations of Paragraph 7 of the Bill of Complaint herein, and leaves plaintiff to strict proof hereof.

VIII.

Answering Paragraph 8 of the Bill of Complaint herein, defendant, being without knowledge as to the allegations thereof, denies the same.

IX.

Answering Paragraph 9 of the Bill of Complaint herein, defendant, being without knowledge as to the allegations thereof, denies the same.

X.

Answering Paragraph 10 of the Bill of Complaint herein, defendant denies that plaintiff is entitled to a perpetual, preliminary or any injunction to restrain defendants, its officers, agents, servants and employees from directly or indirectly making or causing to be made, selling, or causing to be sold, or using or causing to be used, any display devices made in any manner whether in accordance with purported United States Letters Patent Number 1,829,915, Number 1,999,011, or Number 1,923,856, or any of them, and defendant further denies that it has infringed, or that it has done any act or thing, or is doing any act or thing or proposes to do any act or thing in violation of

the said purported Letters Patent, or any of them, in any way whatsoever. [79]

XI.

Defendant denies that plaintiff is entitled to costs or an accounting of profits and damages.

XII.

Defendant denies that plaintiff is entitled to any relief under said Bill of Complaint or Supplemental Complaint in any manner whatsoever.

XIII.

Answering Paragraph 1 of the Supplemental Complaint, defendant denies each and all of the allegations thereof.

XIV.

For a separate and affirmative defense, defendant pleads and hereby gives notice that it will prove at the trial, that as to the pretended Letters Patent Number 1,829,915, Number 1,999,011, and Number 1,923,856, J. J. Wasser was not the original or first or any inventor or discoverer of the alleged inventions or any material or substantial part thereof sought to be patented in and by said alleged Letters Patent, but that prior to the alleged inventions claimed by J. J. Wasser in said Letters Patent Number 1,829,915, Number 1,999,011 and Number 1,923,856, the thing sought to be patented in and by said respective three (3) pretended Letters Patent was described in certain printed publications and patented in and by certain Letters Patent of the

United States and foreign countries by the following named persons on the following named dates, and bearing the following patent numbers:

UNITED STATES LETTERS PATENT

Number of Patent	Date of Patent	Patentee
47,606	May 2, 1865	Slocum
47,822	May 23, 1865	Hoard et al.
53,836	Apr. 10, 1866	Knowlton
		[80]
63,629	April 9, 1867	Gridley
101,135	March 22, 1870	Knapp
149,484	April 7, 1874	Kelley et al.
210,439	Dec. 3, 1878	Trautmann
228,002	May 25, 1880	Swope
234,582	Nov. 16, 1880	Kacer
248,770	Oct. 25, 1881	Mark et al.
281,391	July 17, 1883	Nuhn et al.
303,543	Aug. 12, 1884	Prentiss
303,611	Aug. 19, 1884	Bisler
343,866	June 15, 1886	Taylor
(Des.) 16,779	July 6, 1886	Seely
598,028	Jan. 25, 1898	Smith et al.
627,920	June 27, 1899	Gould
637,201	Nov. 14, 1899	Gay
646,638	April 3, 1900	Cutler
714,320	Nov. 25, 1902	McBride
716,668	Dec. 23, 1902	Cheney
754,110	March 8, 1904	Zenker
964,395	July 12, 1910	Colby
976,693	Nov. 22, 1910	Reichenbach
981,485	Jan. 12, 1911	Seldin
1,047,515	Dec. 17, 1912	Grampp
1,054,252	Feb. 25, 1913	Stranders
1,057,362	March 25, 1913	Smith
1,081,981	Dec. 23, 1913	Palmer
1,158,871	Nov. 2, 1915	Tomlin
1,163,110	Dec. 7, 1915	Schack
1,237,700	Aug. 21, 1917	Roberts

Number of Patent	Date of Patent	Patentee
1,254,151	Jan. 22, 1918	Nagel
1,298,992	April 1, 1919	Merklee et al.
1,300,614	April 8, 1919	Guardino
1,309,263	July 8, 1919	Spellman
1,343,726	June 15, 1920	Jakobson
1,348,899	Aug. 10, 1920	Sargent
1,350,890	Aug. 24, 1920	Tanzey
1,353,531	Sept. 21, 1920	Heard
1,435,519	Nov. 14, 1922	Gautier
1,473,313	Nov. 6, 1923	Piatt
1,477,123	Dec. 11, 1923	Hopkins
1,480,681	Jan. 15, 1924	Goes
1,500,611	July 8, 1924	Ewen
1,536,445	May 5, 1925	Maupai
1,543,190	June 23, 1925	Sagui
1,548,572	Aug. 4, 1925	Ackeret
1,548,682	Aug. 4, 1925	Gulin
1,599,267	Sept. 7, 1926	Amos
1,601,129	Sept. 28, 1926	MacNeil
1,617,850	Feb. 15, 1927	Kelley
1,659,325	Feb. 14, 1928	Merrell
1,683,176	Sept. 4, 1928	Faulhaber
1,699,915	Jan. 22, 1929	Peterson
1,719,618	July 2, 1929	Novick
1,793,348	Feb. 17, 1931	Wood
1,810,027	June 16, 1931	Moran et al.
1,829,613	Oct. 27, 1931	Sato
1,829,915	Nov. 3, 1931	Wasser
1,837,495	Dec. 22, 1931	Shaw
1,840,425	Jan. 12, 1932	Andrews
1,847,277	March 1, 1932	Stephens
1,842,755	Jan. 26, 1932	Hill
		[82]
1,860,547	May 31, 1932	Marsh
1,896,602	Feb. 7, 1933	Andrews
1,923,856	Aug. 22, 1933	Wasser
1,936,340	Nov. 21, 1933	Steudel
1,963,626	June 19, 1934	Lewandowski
1,971,528	Aug. 28, 1934	Klebanow
1,993,355	March 5, 1935	Keller
2,003,449	June 4, 1935	Kuhn

Number of Patent	Date of Patent	Patentee
BRITISH LETTERS PATENT		
13,360	July 1, 1901	Brown
270,886	May 19, 1927	Colour
FRENCH LETTERS PATENT		
483,159	March 10, 1917	Krueger
SWISS LETTERS PATENT		
110,722	Oct. 8, 1924	Huber
CANADIAN LETTERS PATENT		
293,378	Sept. 24, 1929	Wasser

and in other patents of the United States and foreign countries, the numbers, names of inventors, and dates of which are not at present known to defendant, but are being actively and diligently sought for by defendant and its attorneys who pray leave to insert the same herein by amendment when ascertained.

XV.

Prior knowledge and use by each and all of the patentees of the above-mentioned United States Letters Patent at the place given as their respective addresses in said patents of said patentees and prior knowledge and use by the several parties mentioned in said publications and at the places and time specified, and also by the following: [83]

Dallas Knowlton, at Liberty, Maine;
 Roy Allen Spellman, at St. Joseph, Michigan;
 Fred W. Sargent, at Brockton, Massachusetts;
 Ralph G. Heard, at Boston, Massachusetts;
 Charles D. Piatt, at Kansas City, Missouri;
 Henry F. Maupai, at Brooklyn, New York;

Herbert A. Akeret, at Massillon, Ohio;
Irving S. Merrell, at Syracuse, New York;
Washington Taylor, at Sing Sing, New York;
Wolfe Envelope Corporation, at Cleveland,
Ohio;

and the following corporations and individuals all
of San Francisco, California:

- A. W. Stern Folding Paper Box Company,
44 Spear St., at San Francisco, California;
- Fleischhacker Paper Box Company, Second &
Harrison Streets, at San Francisco, Cali-
fornia;
- Fibreboard Products Co., Inc., Russ Building,
at San Francisco, California; [84]
- United States Printing & Lithograph Co., 112
Market Street, at San Francisco, Cali-
fornia;
- Western Paper Box Co., 112 Market St., at San
Francisco, California;
- Louis J. Lazar, 44 Spear Street, at San Fran-
cisco, California;
- Harry P. O'Brien, 401 Second Street, at San
Francisco, California;
- Harry Garcia, Russ Building, at San Fran-
cisco, California;
- Will Foster, c/o Borden's Dairy Delivery, Inc.,
1325 Potrero Avenue, at San Francisco,
California.

Plaintiff and its officers, and particularly the
patentees of the several Letters Patent in suit at
St. Louis, Missouri, and elsewhere in the United

States, and various and sundry individuals, firms and/or corporations at present unknown to defendant whose names and residences and places of use, together with such other publications and/or Letters Patent, if any come to defendant's knowledge, defendant prays leave to set forth by amendment to this Answer when discovered.

XVI.

For further, separate, distinct, affirmative defenses, defendant alleges:

(a) That the Letters Patent in suit, and each of them, are invalid because the alleged invention claimed by each of said Letters patent is not an invention.

(b) That said Letters Patent in suit, and each of them, are invalid because the alleged invention claimed in each of said Letters Patent was not new at the time of the alleged inventor's alleged invention or discovery thereof, the full particulars of which are not at present known to defendant, and which defendant prays leave to insert by amendment hereto when ascertained. [85]

(c) That said Letters Patent in suit, and each of them, are invalid because the alleged invention disclosed in each of said Letters Patent is not useful.

(d) That said Letters Patent in suit, and each of them, are invalid because the alleged invention claimed in each of said patents was well known to and used by others in this country before the date

of the alleged invention or discovery thereof, which others include the applicants for the United States Letters Patent and their assignees set forth in Paragraph XIV hereof, residing at the residences stated in said patents, at said places of residence and elsewhere in the United States, and others, the names and addresses of whom are at present unknown to defendant but which are being actively and diligently sought for by defendant and its attorneys, who pray leave to insert the same herein by amendment when ascertained.

(e) That said Letters Patent in suit, and each of them, are invalid because the alleged invention claimed in each of said Letters Patent was described in certain printed publications in this or in some foreign country before the alleged inventor's alleged invention or discovery thereof, or more than two years prior to the date of application therefor, such publications beign the Letters Patent set forth in Paragraph XIV hereof; and in other printed publications, the particulars of which are not at present known to defendant, but which are being actively and diligently sought for by defendant and its attorneys, who pray leave to insert the same herein by amendment when ascertained.

(f) That said Letters Patent in suit, and each of them, are invalid because the alleged invention claimed in each of said Letters Patent was in public use or on sale in this [86] country for more than two years prior to the date of application therefor by the applicants for the Letters Patent and their

assignees set forth in Paragraph XIV hereof, residing at the residences stated in said Letters Patent at said places of residence and elsewhere in the United States, and by others, the names and addresses of whom are not at present known to defendant but are being actively and diligently sought for by defendant and its attorneys, who pray leave to insert the same herein by amendment when ascertained.

(g) That said Letters Patent in suit, and each of them, are invalid because the alleged invention claimed in each of said Letters Patent is not in fact an invention but is merely an aggregation.

(h) That the plaintiff can not maintain this suit because it has no title to the Letters Patent in suit, and each of them, or not sufficient title to enable it to maintain this action.

(i) That the plaintiff can not maintain this suit because it does not come into this court with clean hands and is, therefore, estopped from enforcing any right of action against this defendant.

(j) That said Letters Patent in suit, and each of them, are invalid because the plaintiff was, or its predecessors in interest were, guilty of laches and unreasonable delay in the prosecution of the applications for the Letters Patent in suit and each of them.

(k) That the plaintiff can not maintain this suit and is entitled to no relief against this defend-

ant, because it is, and was, guilty of laches and unreasonable delay in the filing of this suit.

(1) That said Letters Patent in suit, and each of them, and all of the claims of each thereof, are invalid and void [87] and can not be given a valid interpretation which would bring any acts of this defendant within the scope thereof, because said Letters Patent in suit, and each of them, and all of the claims of each thereof, are so limited and restricted by the state of the art as it existed prior to the alleged invention or discovery by the respective applicants for said respective Letters Patent, and by the acts of said applicants and of their duly authorized attorneys in the prosecution of the applications for said respective Letters Patent, and particularly by limitations and restrictions embodied in said respective Letters Patent, under the requirements of the Commissioner of Patents promulgated during proceedings in the Patent Office while said applications, and each of them, were pending therein, as to exclude from said respective Letters Patent and from each and all of the claims thereof, any acts of this defendant.

(m) That the alleged inventions purported to be patented by said Letters Patent had been in public use or on sale in this country for more than two years before the application of said J. J. Wasser for Letters Patent therefor, all had been abandoned to the public.

(n) That when the application upon which said Letters Patent were issued were filed in the Patent

Office, each of said applications contained both broad and narrow claims and thereafter, during the prosecution of each of said applications, the broad claims thereof were rejected and such rejection was acquiesced in by the applicant who thereupon cancelled the same or amended the said claims by words of limitation, whereby the same were narrowed and confined to the precise structure therein described, which narrow or narrowed claims are embodied in each of said Letters Patent and plaintiff is thereby estopped from broadening any of [88] said claims so as to make the same equivalent to any broader claim so cancelled or amended, and to assert that any claim of each of said Letters Patent is readable on the device now complained of by this plaintiff.

(o) That said Letters Patent in suit, and each of them, are invalid because the patentee actually abandoned the alleged inventions therein described and thereby lost all right to Letters Patent thereon.

(p) That J. J. Wasser surreptitiously and/or unjustly obtained said Letters Patent, and each of them, for that which was in fact originated by others who were using reasonable diligence in adapting and perfecting the same and putting the same into use to-wit: Persons mentioned in Paragraph XIV hereof and others who are not at the present time known to defendant, but defendant prays that when it becomes advised of the names of said parties it be permitted to amend this Answer to Bill of Complaint and Supplemental Complaint.

(q) That said Letters Patent in suit, and each of them, are invalid because they do not particularly point out, nor distinctly claim, the part, improvement or combination which the inventor claims as his invention or discovery.

(r) That said Letters Patent in suit, and each of them, are invalid because they are ambiguous and contain nebulous claims.

XVII.

That with respect to said Letters Patent No. 1,829,915 in suit, defendant avers that said Letters Patent is void ab initio and invalid, because it covers an alleged invention which had been patented by plaintiff or by its authority, in a foreign country on an application filed more than twelve months prior to [89] the filing date of the application on which said Letters Patent No. 1,829,915 issued, to-wit, in the Dominion of Canada, on September 24, 1929, No. 293,378, on an application filed December 17, 1928, wherefore, under Section 4887 of the Revised Statutes plaintiff had no legal right to receive said Letters Patent No. 1,829,915 and the Commissioner of Patents was without legal authority to issue said Letters Patent No. 1,829,915.

XVIII.

Further answering, defendant avers that said Letters Patent No. 1,829,915 is void ab initio and invalid, because the application on which said Letters Patent No. 1,829,915 issued was incomplete in

that it was not accompanied by an oath of Joseph J. Wasser, the applicant on whose application the patent was issued, in that form and containing the averments required by law in such cases made and provided, and by the Rules of Practice of the Patent Office relating thereto promulgated by the Commissioner of Patents under the authority granted to him by statute to make such rules.

XIX.

Defendant avers that said Letters Patent No. 1,829,915 is void ab initio and invalid, because of the deliberate fraud perpetrated by Joseph J. Wasser, the applicant, on whose application said Letters Patent No. 1,829,915 was issued, and instigated by the plaintiff, on the Commissioner of Patents, in connection with the application on which said Letters Patent No. 1,829,915 was issued, in that reference to and information concerning the Canadian Letters Patent No. 293,378 which had been previously issued to plaintiff as the assignee of the applicant, on an application filed by the alleged inventor, [90] Joseph J. Wasser, was deliberately and fraudulently omitted from the oath forming a part of the application on which said Letters Patent No. 1,829,915 issued, with the fraudulent intention to obtain the grant of said Letters Patent No. 1,829,915, in violation of the laws in such cases made and provided, whereby the Commissioner of Patents was deceived and was without knowledge of the fact that a foreign patent had been granted

to plaintiff on an application filed by Joseph J. Wasser more than twelve months prior to the filing of the application for said Letters Patent No. 1,829,915 for the same invention, such deliberate omission from the oath, of information concerning said Canadian Letters Patent resulting in the grant of said Letters Patent No. 1,829,915 by the Commissioner of Patents without authority of law and in violation of the law in such cases made and provided.

XX.

Defendant avers that said Letters Patent No. 1,829,915 is invalid and of no force or effect in view of the history of the application on which said Letters Patent No. 1,829,915 issued, as found in the Patent Office records, and more particularly when said application and Letters Patent No. 1,829,915 are considered in connection with prior copending applications filed by Joseph J. Wasser, to wit: Application Serial Number 306,887, filed September 19, 1928, for Improvement in Display Device, and application of Joseph J. Wasser, Serial Number 332,258 (i.e. Letters Patent No. 1,923,856 in suit) filed January 14, 1929, for Improvement in Display Device; and, further, because the said Joseph J. Wasser for the deliberate purpose of deceiving the Patent Office and the public, embodied in the specification of said Letters Patent No. 1,829,915 false statements containing less than the whole truth relevant to the alleged invention. [91]

XXI.

Defendant avers that Joseph J. Wasser was not the original, first, sole or any inventor of the Display Device described and claimed in said Letters Patent in suit, or any of them, but, on the contrary, that he surreptitiously and unjustly obtained a patent for that which was in fact the invention of one Rusling Wood, who was using reasonable diligence in adapting and perfecting the same, and to whom Letters Patent No. 1,793,348 were issued on February 17, 1931; that thereafter and on June 10, 1931 the claim of Letters Patent No. 1,923,856 in suit was presented to the Patent Office for the first time and after said Rusling Wood had placed on the market Neckbands for Bottles made under and in accordance with the said Wood Letters Patent and that thereby said Wood and the public in general, including this defendant, acquired intervening rights.

XXII.

That defendant further shows that in regard to said Letters Patent No. 1,999,011, which purports to be a continuation in part of an alleged copending application Serial Number 332,558 (i. e. Letters Patent No. 1,923,856 in suit), said Letters Patent No. 1,999,011 is void because of unreasonable delay in filing an application for the same; that by reason of such unreasonable delay plaintiff was guilty of laches and is now estopped to assert any claim under said Letters Patent against this defendant; and also that said Letters Patent No.

1,999,011 is void on said Canadian Letters Patent No. 293,378, dated September 24, 1929.

XXIII.

That as between said Letters Patent No. 1,923,856 and No. 1,829,915, the same are void for double patenting. [92]

SET-OFF, COUNTERCLAIM AND CROSS COMPLAINT.

And for a further and separate defense arising out of the same transaction and subject matter involved in this suit against plaintiff herein, and praying for affirmative relief, defendant avers and shows as follows:

XXIV.

That defendant Borden Printing Company, a corporation duly organized and existing under and by virtue of the laws of the State of California; for many years last past and for many years prior to the filing of the Bill of Complaint herein and at the time of filing said Bill of Complaint and ever since the filing thereof has been and now is lawfully engaged in an extensive printing business, selling among other things bottle collars which bottle collars in no manner whatsoever constituted or can be construed to constitute an infringement or infringes plaintiff's patents herein sued upon.

XXV.

That during a long course of honorable dealing, defendant has built up a successful and remunerative business in said bottle collars; that defendant's

product has been of good quality and has met with favor in the trade from purchasers; and while defendant's business grew slowly, it has gradually established a business that was proving profitable in as much as it had established a goodwill for its product and save for the arbitrary and wrongful acts of plaintiff herein complained of, this defendant would remain undisturbed in the enjoyment of said business reputation and goodwill.

XXVI.

That plaintiff, nevertheless and notwithstanding the fact that defendant's bottle collar never has and never did [93] infringe said patents in suit nor any of them, has made improper, arbitrary and wrongful use of its alleged ownership of said patents by bringing this suit against defendant, pretending without just or any cause that defendant is infringing; publicizing by false and malicious advertising and unfair trade practices that said suit has been brought and the making of false claims as to the scope of the alleged patent monopoly, all to the harassment, annoyance, irreparable injury and damage of defendant, its agents and customers, in its legitimate business as aforesaid.

XXVII.

Defendant further shows that the plaintiff in its unlawful designs and conspiracy against defendant has continually both before and since the bringing of this suit, harassed and threatened defendant's customers in their lawful business, and that, among other things, and on information and be-

lief, defendant avers that plaintiff's agents have gone directly to defendant's customers and have made untrue statements concerning and reflecting on defendant's financial standing, and are threatening the customers or prospective customers with lawsuits if they continue to use defendant's bottle collar or if they bought defendant's bottle collars, all without just or any cause and all to the irreparable injury of defendant.

XXVIII.

That plaintiff's threats have had the result of dissuading prospective customers from buying defendant's bottle collars and plaintiff has threatened that if the customers or prospective customers bought defendant's device, the latter would be subject to an infringement suit, further, plaintiff's unlawful practices have seriously injured defendant's credit and made it difficult for it to carry on its business, all with the [94] result of causing defendant irreparable injury; that well knowing the premises that defendant's bottle collars do not and never have infringed the said Wasser Patents in suit, plaintiff has continued the wrongful and unfair competition as above set forth, and has unlawfully brought this suit for the purpose of harassing defendant in its lawful business and with the intent and purpose of putting it out of business.

XXIX.

That all of said acts averred in Paragraphs XXVI, XXVII and XXVIII, constitute unfair competition on behalf of plaintiff, Pevely Dairy Company.

Wherefore, defendant prays:

(1) That the Bill of Complaint be dismissed with prejudice and with costs to defendant.

(2) That a Writ of Injunction both preliminary and permanent be issued out of this Court enjoining and restraining the plaintiff, its agents, clerks, attorneys, servants and employees and those in privity with it or them from issuing letters or advertisements or publishing statements in any form whatsoever, either written or oral claiming that defendant's device infringes or has infringed any of said alleged letters patent in suit, and from threatening any of defendant's customers or prospective customers or prospects with litigation or prosecution or with the costs and expenses of litigation or otherwise publishing statements, either written or oral intended or by a reasonable construction likely or apt to cause damage to this defendant in the business of manufacture, use and/or sale of its bottle collars.

(3) That the Court will, in rendering said decree for an injunction against said unfair competition of plaintiff for improper use of its alleged own-

[95]

ership of said letters patent in suit, assess or cause to be assessed against plaintiff, damages not capable of present determination, but in an amount in excess of Ten Thousand Dollars (\$10,000.00), which defendant has suffered by reason of such unfair competition and unlawful acts of plaintiff as recited herein and also the profits which have accrued to plaintiff by reason of its unlawful acts as aforesaid.

(4) That the Court will increase the amount of said damages by reason of plaintiff's willful, malicious and oppressive interferences with defendant's rights.

(5) That the Court award to the defendant such other, further and different relief in the premises as in equity and good conscience will be meet and proper.

BORDEN PRINTING COMPANY,
a Corporation
By: TOWNSEND & HACKLEY,
Its Attorneys

TOWNSEND & HACKLEY,
CHAS. E. TOWNSEND,
ROY C. HACKLEY, JR.
JACK E. HURSH.

(Admission of Service)

[Endorsed]: Filed Aug. 4, 1939. [96]

[Title of District Court and Cause.]

MOTION TO STRIKE

The plaintiff hereby moves to strike from the Answer to the Bill of Complaint and Supplemental Complaint served herein on or about August 4, 1939, paragraphs XVIII and XIX.

BOYKEN, MOHLER & GORDON,
Solicitors for Plaintiff.

(Admission of service.)

[Endorsed]: Filed Aug. 15, 1939. [97]

[Title of District Court and Cause.]

MOTION FOR FURTHER BILL OF
PARTICULARS

In connection with the new Answer served on or about August 4, 1939, plaintiff requests that the defendant make more definite its answer to the Bill of Complaint and Supplemental Bill of Complaint in the following particulars, to wit: [99]

1.

Describe and illustrate the articles said to constitute prior knowledge by each of the individuals and companies listed in paragraph XV, but limited to those listed on pages 8 and 8-a of the Answer, and including the plaintiff and its officers.

2.

State what is the alleged deficiency in plaintiff's title pleaded in paragraph XVI (h).

3.

State in detail what acts or reasons are alleged to cause the plaintiff to come into the Court without clean hands, as alleged in paragraph XVI (i).

4.

Set forth the limitations in the claims of the patent in suit, infringement of which is charged, which limitations are said to restrict the claims as set forth in paragraph XVI (l) and (n) of the Answer.

5.

State what facts indicate abandonment of the subject matter of the letters patent in suit as set forth in paragraph XVI (m).

6.

State what claims in the patents in suit are alleged to cover the same invention or inventions as the claims in the Canadian patent 293,378 as set forth in paragraph XVII.

7.

Specify the false statements in letters patent 1,829,915 containing less than the whole truth as alleged in paragraph XX.

8.

State whether or not it will be alleged at the trial that: [100]

(a) There is identity between the drawings and disclosure of letters patent 1,999,011 and Canadian patent 293,378; and

(b) the claims of said letters patent 1,999,011 could be made in the Canadian patent.

9.

Specify when occurred the first manufacture of a device made in accordance with the Wood patent 1,793,348 as set forth in paragraph XXI.

10.

Specify in what way the obtaining of the patent in said letters patent was effected surreptitiously, and unjustly, in connection with the alleged Rusling Wood invention as alleged in paragraph XXI.

11.

State whether or not it will be alleged at the trial that the disclosure of letters patent 1,829,915 could support the single claim of letters patent 1,923,856.

BOYKEN, MOHLER & GORDON,
Solicitors for Plaintiff.

(Admission of service.)

[Endorsed]: Filed Aug. 15, 1939. [101]

[Title of District Court and Cause.]

REPLY TO SET-OFF, COUNTERCLAIM AND
CROSS-COMPLAINT

In response to the Set-Off, Counterclaim and Cross-Complaint annexed to the Answer served herein on or about August 4, 1939, plaintiff pleads as follows: [102]

1.

Plaintiff admits, as alleged in paragraph XXIV, that Borden Printing Company is a corporation of California; is without information as to the printing business engaged in by the defendant, other than the manufacture of bottle collars and, therefore, denies the same; and denies that the bottle collars made by the defendant do not infringe the letters patent of the plaintiff as set forth in the Bill of Complaint.

2.

In response to paragraph XXV, plaintiff denies that the dealing of the defendant has been honor-

able, since it has involved infringement of plaintiff's patents, and is otherwise unadvised as to the matters set forth therein and, therefore, denies the same.

3.

In regard to paragraph XXVI, plaintiff denies each and every allegation thereof.

4.

As set forth in paragraph XXVII, plaintiff denies each and every allegation thereof.

5.

In connection with paragraph XXVIII, plaintiff denies each and every allegation thereof.

6.

In connection with paragraph XXIX, plaintiff denies that any acts set forth in paragraphs XXVI, XVII, and XVIII constitute unfair competition, and denies that it has committed any such act; and denies that such acts justify dismissing the Bill of Complaint; and denies that defendant is entitled to any injunction, or to any damages, or costs, or expenses, or to any other relief in connection therewith. [103]

7.

Plaintiff further avers that the Set-Off, Counterclaim, and Cross-Complaint fails to state a claim against plaintiff upon which relief can be granted, and specifically does not state a case for relief by injunction, and plaintiff, therefore, moves to dis-

8.

miss the said pleading, and hereby gives notice that the Motion will be presented at the trial hereof.

Plaintiff further demands that the Set-Off, Counterclaim, and Cross-Complaint be dismissed with costs thereof to plaintiff.

PEVELY DAIRY COMPANY,
By BOYKEN, MOHLER & GORDON,
Solicitors for Plaintiff.

(Admission of service.)

[Endorsed]: Filed Aug. 15, 1939. [104]

[Title of District Court and Cause.]

BILL OF PARTICULARS

Comes now defendant above named, and furnishes its second bill of particulars, in response to plaintiff's motion therefor, and pursuant to order of court dated July 31, 1939; and avers as follows:

1.

Motion for particular 1 was denied. [105]

2.

(a) The false and malicious advertising of which defendant-cross-complainant is now apprised, to which reference is made in paragraph XVIII of the counterclaim and cross-complaint herein, is stated on information and belief, subject to correction if error found, and subject to elaboration if, when and as additional, other or different evidence

thereof is hereafter discovered, to be in substance:

1. That prior to filing the counterclaim herein, and both before and after the filing of the Complaint herein, one John Doe Lambertsen, and probably others, representing himself or themselves to be an agent or agents, or representative or representatives, of plaintiff-cross-defendant herein, approached numerous customers and prospective customers of defendant-cross-complainant, and particularly Marin-dell Milk Co., Bell-Brook Dairies, Inc., Greenbrae Dairy Co., and Golden State Company, Ltd., all of San Francisco, California; threatening that if these firms purchased bottle collars of any sort or kind whatsoever from defendant-cross-complainant, said firms would be sued by plaintiff-cross-defendant on numerous unspecified grounds and for infringement of various unnamed patents; that their supplies of bottle collars would be confiscated; and that they would be held responsible for damages and profits, and treble damages. That these charges of infringement were recklessly and without just or any cause directed to all and every kind of collar to surround a bottle neck.

2. Further carrying out the same practice plaintiff-cross-defendant, acting directly and through the agency of its representative Leroy Neher, addressed a letter to the aforementioned Bell-Brook Dairies, Inc., re-stating the threats made by Lambertsen as aforesaid. Cross-complainant has not in its [106] possession a copy of the letter of plaintiff-cross-defendant to said Bell-Brook Dairies, Inc., but since the letter was written by cross-defendant the con-

tent thereof is more particularly within the knowledge of cross-defendant than of cross-complainant. If and when a copy of said letter is obtained by cross-complainant a copy thereof will be furnished to cross-defendant. Meanwhile, demand is hereby made on cross-defendant, under Rule 36 of the Federal Rules of Civil Procedure, for production of said letter and of all *other* others of similar import.

That upon information and belief the threats aforesaid accomplished the purpose thereof, namely that of intimidating said customers and prospective customers of cross-complainant in such manner that, in the instance of Bell-Brook Dairies, Inc., they gave only a portion of the bottle collar business to cross-complainant, rather than all, as promised, expressing their reason for not giving more of their promised trade to cross-complainant as being the fact that if they gave all of their collar business to cross-complainant, they feared that cross-defendant would carry out its threat and bring suit. The balance of the bottle collar business of said Bell-Brook Dairies, Inc., was given to cross-defendant.

That the Greenbrae Dairy Co. and Marin-dell Milk Co., by reason of being entirely intimidated by the wrongful threats aforesaid; refused to do any business whatsoever with cross-complainant; and that the business of cross-complainant with Golden State Company, Ltd., was by said threats directly, seriously and irreparably impaired.

(b) The unfair trade practices referred to in said paragraph XVIII of the cross-complaint herein

comprise the acts [107] set forth in Particular 2(a).

(c) Motion for this particular was denied.

3.

The subject referred to in defendant's cross-complaint as "defendant's bottle collars" includes the following:

(a) The type of collar Exhibit A attached hereto, which said collar was first sold by cross-complainant for commercial use during November, 1938.

(b) The type of collar Exhibit B attached hereto, which was first sold by cross-complainant for commercial use during November, 1938.

(c) The type of collar Exhibit C attached hereto, which was first sold by cross-complainant for commercial use about May, 1939.

(d) The type of collar Exhibit D attached hereto, which was first sold by cross-complainant for commercial use about June 1, 1939.

(e) The type of collar Exhibit E attached hereto, which was first sold by cross-complainant for commercial use about May 1, 1939.

4.

Answering request for particular 4, in so far as the request is understood, cross-complainant furnishes particular 4 by stating that cross-complainant's sales of bottle collars have been principally confined to customers having their principal places of business in the City and County of San Francisco, and in Alameda County and San Mateo County, California. The first commercial sales in San Mateo County were made about May, 1939;

the first [108] sales in Alameda County being made about May, 1939.

5.

(a) In so far as cross-complainant is able to comprehend request for particular 5, it is assumed that said inquiry is directed not to paragraph XVIII of the cross-complaint, as set forth, but rather to paragraph XVII thereof; and in that connection it is stated that cross-complainant sold approximately 100,000 of the type of collar of cross-complainant which is annexed to the original complaint herein, approximately 100,000 of the type of bottle collar illustrated as Exhibit 3 to plaintiff's first Motion for Bill of Particulars herein, and approximately 1,000,000 of the type of collar designated as "Plaintiff's Exhibit 4" annexed to plaintiff's said first Motion for Bill of Particulars.

(B) Particular 5 (b) was denied.

6.

(a) This particular was denied.

(b) In so far as requested for particular 6(b) is understood, it is stated on information and belief that statements derogating cross-complainant's financial standing were made to the firms and by the individual named in particular 2(a) above. Invariably, wherever the specified charge of infringement was made it was coupled with the statement or implication that defendant-cross-complainant was not financially responsible and that defendant-cross-complainant would be unable to protect or defend the user or customer or prospect if the latter were

sued for the use of defendant-cross-complainant's products.

(c) This particular is furnished by particular 6(b). [109]

(d) Upon information and belief it is stated that the individual named in particular 2(a) above, and probably others, threatened the customers named in said particular 2(a) with lawsuits involving charges of unfair competition and patent infringement, said patent infringement suits to be directed to types of bottle collars of cross-complainant concerning which infringement did not and does not exist. The relationship of said individual or individuals to cross-defendant is best known to cross-defendant, and the exact status thereof is not known to cross-complainant, excepting that said individual or individuals is or are held out to be a duly authorized agent or agents of cross-defendant.

The sum and substance of plaintiff-cross-defendant's unlawful practices has been to create in the mind of the public a feeling that no one other than plaintiff-cross-defendant may make or sell a bottle collar of any description, without plaintiff's consent; and further to instill into the mind of the public that this defendant in particular is financially incapable of carrying out its financial obligations; all of which pretenses and representations by plaintiff-cross-defendant are maliciously untrue.

7.

Particular 2(a) above supplies all the information at present possessed by cross-complainant which could be furnished as particular 7.

8.

Particulars 8(a) and 8(b) were denied.

The foregoing particulars are furnished to the best [110] of the information and belief of cross-complainant possessed as of the date thereof, subject to correction of error found, and to elaboration and addition if, when and as additional evidence pertaining to the said allegations is obtained by cross-complainant.

Dated: August 21, 1939.

TOWNSEND & HACKLEY,
CHAS. E. TOWNSEND,
Attorneys for
Defendant-Cross-Complainant.

A copy of the within Bill of Particulars is hereby acknowledged this 21st day of August, 1939.

BOYKEN, MOHLER & GORDON,
Attorneys for
Plaintiff-Cross-Defendant.

Exhibits A through D annexed to the Bill of Particulars are physical Exhibits 21, 22, AA and V transmitted as physical exhibits to this Court, as was Exhibit E.

[Endorsed]: Filed Aug. 21, 1939. [111]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 7th day of October, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

Plaintiff's motion to strike paragraphs XVIII and XIX of the Answer having been heretofore heard and submitted, being now fully considered, of defendant and plaintiff's motion for further bill of particulars, it is ordered that said motion to strike paragraphs XVIII and XIX of the Answer of defendant be and the same is hereby denied and that said motion for further bill of particulars be and the same is hereby granted as to paragraphs XV, XVII and XXI and that said motion for further bill of particulars be and the same is hereby denied as to all the remaining paragraphs. [113]

[Title of District Court and Cause.]

DEFENDANT'S BILL OF PARTICULARS

Comes now Defendant above named and furnishes his Third Bill of Particulars in response to Plain-

tiff's Motion therefor, filed on or about August 14, 1939, and pursuant to Order of Court dated October 9, 1939, and avers as follows:

I.

All Particulars except 1, 6, and 9, stand denied.

[114]

II.

Particular 1 reads as follows:

“Describe and illustrate the articles said to constitute prior knowledge by each of the individuals and companies listed in paragraph XV, but limited to those listed on page 8 and 8-a of the Answer, and including the plaintiff and its officers.”

Answer:

(a) The articles described and illustrated in each of the several patents set out in Paragraph XIV of the Answer;

(b) The devices of the several companies and individuals, resident in San Francisco and mentioned at the bottom of page 8 and the top of page 8a, generally involved a paper or cardboard product in which adjacent ends of the paper or cardboard product were provided with interlocking means substantially identical with the interlocking means shown in each of the several Wasser patents. In some cases, the interlocking means was of the type shown in Wasser Patent No. 1,923,856 with a hook-shaped member corresponding to the projection 5 of said patent, interlocking with a complimentary slit simi-

lar to slit 4 of said patent. Other of said devices long used in the industry, employed a fish-tail projection like projection of 19, Fig. 4 of Patent No. 1,829,915 fitting into a complimentary slit like slit 17 of said patent. Said prior users also employed, long prior to the date of invention of anything herein shown by the patentee Wasser in securing or interlocking means like that shown in the Wasser Patent No. 1,999,011. As far as the defendant is advised at the present time, each and every one of the corporations so mentioned at the bottom of page 8 and the top of page 8a, and each of the several individuals therein mentioned, used these constructions; and defendant is so prepared to prove at the trial. [115]

III.

Particular 6 reads as follows:

“State what claims in the patents in suit are alleged to cover the same invention or inventions as the claims in the Canadian patent 293,378 as set forth in paragraph XVII.”

Answer:

Each and all of the claims sued on, to-wit: claims 4 to 11 of Patent No. 1,829,915, and each and all of the claims, three in number, of Wasser Patent No. 1,999,011.

IV.

Particular 9 reads as follows:

“Specify when occurred the first manufacture of a device made in accordance with the Wood patent 1,793,348 as set forth in paragraph XXI.”

Answer:

Defendant shall rely upon the date of filing of said Wood Patent No. 1,793,348, to-wit: August 23, 1930, for a constructive reduction to practice. Also, Defendant will rely upon the file wrappers of the several patents in suit to show knowledge on behalf of plaintiff of the issuance of the Wood Patent, and of the consequent later amendments in said Wasser applications predicated on said Wood Patent, and consequent acquisition of intervening rights on behalf of this Defendant.

Dated: October 10, 1939.

TOWNSEND & HACKLEY,
CHARLES E. TOWNSEND,
ROY C. HACKLEY, JR.

(Admission of Service)

[Endorsed]: Filed Oct. 10, 1939. [116]

District Court of the United States
Northern District of California
Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 7th day of May, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Michael J. Roche, District Judge.

[Title of Cause.]

This cause having been heretofore tried and submitted to the Court for consideration and decision, the Court, after due consideration, finds that the alleged inventions of plaintiff, for which Letters Patent No. 1,829,915, No. 1,999,011 and No. 1,923,856 were issued, were covered by the prior art set forth in Guardino Patent No. 1,300,164, Taylor Patent No. 343,866, Goes Patent No. 1,480,661, Gridley Patent No. 63,629 and Spellman Patent No. 1,309,263 so as to make plaintiff's patents void for want of invention. Therefore, it is Ordered that the bill of complaint be dismissed, that a writ of injunction be denied, that each party bear its own costs, and that a decree be entered herein accordingly upon findings of fact and conclusions of law to be prepared by the attorneys for the defendant in accordance with the Rules of this Court. [117]

[Title of District Court and Cause.]

NOTICE

MESSRS. BOYKEN, MOHLER & GORDON,
Attorneys at Law,
723 Crocker Building,
San Francisco, California.

MESSRS. TOWNSEND & HACKLEY,
Attorneys at Law,
909 Crocker Building,
San Francisco, California.

You Are Hereby Notified that on May 7th, 1940, Judge Michael J. Roche finds that the alleged inventions of plaintiff, which Letters Patent No. 1,829,815, No. 1,999,011 and No. 1,923,856 were issued, were covered by the prior art set forth in Guardino Patent No. 1,300,164, Taylor Patent No. 343,866, Goes Patent No. 1,480,661, Gridley Patent No. 63,629 and Spellman Patent No. 1,309,263 so as to make plaintiff's patents void for want of invention. Therefore, it is Ordered that the bill of complaint be Dismissed; that a writ of injunction be Denied; that each party bear its own costs, and that a decree be entered herein accordingly upon findings of fact and conclusions of law to be prepared by the attorneys for the defendant in accordance with the Rules of this Court.

WALTER B. MALING,
Clerk.

San Francisco, California. (a)
May 8th, 1940. [118]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause having come on to be heard before the Honorable Judge Michael J. Roche and having been brought to a final hearing on October 17, 18 and 19, 1939, upon the pleadings and proofs of evidence adduced by both parties, and counsel for the respective parties having submitted briefs, and the cause having been fully considered by the court, the court does now, [119] in connection therewith, make the following findings of fact and conclusions of law:

FINDINGS OF FACT

(1) This is a suit for alleged infringement of three several Letters Patent, all issued to one Joseph J. Wasser and all for "Display Devices", assigned to plaintiff, Pevely Dairy Company.

The patents in order of time of filing of application are as follows:

No. 1,923,856, issued Aug. 22, 1933, application filed Jan. 14, 1929;

No. 1,829,915, issued November 3, 1931, application filed Dec. 18, 1930;

No. 1,999,011, issued April 23, 1935, application filed Aug. 17, 1933.

At the trial plaintiff relied on the single claim of patent No. 1,923,856; claims 4, 7, 8, and 11 of patent No. 1,829,915; and claim 3 of patent No. 1,999,011.

(2) The plaintiff, Pevely Dairy Company, assignee of said Wasser of the three patents in suit, is a Missouri corporation of St. Louis, Missouri.

(3) The Defendant, Borden Printing Company, is a California corporation of San Francisco, California, and for many years last past has been, and now is, engaged in an extensive printing business, selling, among other things, bottle collars.

(4) This Court has jurisdiction of the parties hereto and the subject matter herein involved. [120]

(5) The device disclosed in each of the three patents in suit consists of a strip of paper curved into the shape of a frustum of a cone, with the ends of the strip held together by glue, staples, or a tongue-and-slot locking means. The three patents all relate to an arcuate strip of material, substantially identical in every patent, except for the particular means for securing the ends of the strip together. In other words, the sole invention, if any, in any two of the patents over the third, lies in the locking means.

(6) Defendant's good faith is shown by the fact that before defendant ever began manufacture of the accused devices, Mr. Borden, President of defendant, consulted its patent counsel to ascertain if its contemplated structures infringed any existing patents; and after due investigation defendant was advised that such structures and devices did not infringe any existing patents. Defendant did not proceed to manufacture until it was so advised. (Tr. 102, 103 and 124; defendant's brief page 91).

(7) The single claim of patent No. 1,923,856 is directed to the precise shape of the hook-shaped tongue (5), specifying that the tongue has "approximately parallel side edges (6-8) and being adapted to be inserted and withdrawn through said slit (4)."

(8) In the second patent, No. 1,829,915, the shape of this slit is varied to a "fishtail" type fitting into an angular slit (17-18) in the other end of the strip. The purpose of the angular slit is to permit a pivotal action of the tongue in the slit, so that the smaller end of the cone [121] can be enlarged without straining in any way the fragile paper device. (Borden, Tr. 118; Roemer, Tr. 157-158). This pivotal action, however, was clearly the function of the first patent. (Tr. 158).

(9) In the third patent, No. 1,999,011, the securing means of the two ends of the arcuate strip is permanently made by gluing, stitching, staples, or the like; or, as the patentee says in his claims: "means for immovably connecting the overlapping ends of the piece of material".

(10) As seen by the file wrapper (Exhibit O) of patent No. 1,923,856 in suit, the following references were cited:

- 53,836 April 10, 1866 Knowlton
- 1,309,263 July 8, 1919 Spellman
- 1,829,915 Nov. 3, 1931 Wasser
- 110,722 July 1, 1925 Huber (Swiss)
- 13,360 July 1, 1901 Brown (British)

(11) As seen by the file wrapper (Exhibit P) of patent No. 1,829,915 in suit, the following references were cited:

- 1,309,263 July 8, 1919 Spellman
- 1,793,348 Feb. 17, 1931 Wood
- 13,360 July 1, 1901 Brown (British)
- 110,722 July 1, 1925 Huber (Swiss)

(12) As seen by the file wrapper (Exhibit Q) of patent No. 1,999,011 in suit, the following references were cited:

- 1,309,263 July 8, 1919 Spellman
- 1,829,915 Nov. 3, 1931 Wasser
- 1,923,856 Aug. 22, 1933 Wasser
- 53,830 Apr. 10, 1866 Knowlton
- 1,054,252 Feb. 25, 1913 Strandens
- 110,722 July 1, 1925 Huber (Swiss)
- 13,360 July 1, 1901 Brown (British) [122]

(13) Other pertinent prior art patents with respect to patent No. 1,923,856 in suit are represented on chart, Exhibit EE, including:

- 228,002 Swope
- 1,300,164 Guardino
- 704,549 Klein
- 716,668 Cheney
- 63,629 Gridley

(14) A comparison of plaintiff's collar, Exhibit 25, with the Spellman Lampshade collar, Exhibit FF, shows that all Wasser has done is to put an angular slot on the end of the straight Spellman

slot; this angular slot offering the pivotal connection so much stressed in Wasser patent No. 1,829,915 is a feature and function entirely missing in anything used or made by the defendant. In the Neher-Whitehead license, Exhibit L, the patented device is referred to as a "Milk Bottle Lampshade".

(15) Other pertinent prior art patents as against patent No. 1,829,915 and not cited by the Patent Office are illustrated on the chart, Exhibit HH, including:

Guardino 1,300,614 April 8, 1919 and model, Exhibit GG;

Taylor 343,866 June 15, 1886 and model, Exhibit II;

Goes 1,480,681 Jan. 15, 1924; and model, Exhibit JJ;

Gridley 63,629 Apr. 9, 1867 and model, Exhibit KK.

(16) The pertinent prior art patents, most of which were not cited by the Patent Office against patent No. 1,999,011, are represented by the chart, Exhibit MM, and include the following:

13,360 Brown (British)

47,822 Hoard and Miles

53,836 Knowlton

716,668 Cheney

1,158,871 Tomlin [123]

(17) The alleged inventions of the several patents in suit were already old in the prior art, as set forth in various patents, including:

1,300,164 Guardino

343,866 Taylor

1,480,661 Goes

63,629 Gridley

1,309,263 Spellman

(18) The component elements of claims 4, 7, 8 and 11 of Wasser patent No. 1,829,915, the component elements of the claim of Wasser patent No. 1,923,856, and the component elements of claim 3 of Wasser patent No. 1,999,011, and each thereof, are found in each of the prior art patents to Guardino, No. 1,300,164; Taylor, No. 343,866; Goes No. 1,480,761; Gridley, No. 63,629; and Spellman, No. 1,309,263.

(19) The patents in suit and each thereof, in respect to the claims sued on, are for a mere aggregation and not for a new or patentable combination.

(20) During a long course of honorable dealing, defendant, Borden Printing Company, has built up a successful and remunerative business in said bottle collars, and has established great good-will for its product. [124]

CONCLUSIONS OF LAW.

(1) That the claim of Wasser patent in suit No. 1,923,856, claims 4, 7, 8, and 11 of Wasser patent in suit No. 1,829,915 and claim 3 of Wasser

patent in suit No. 1,999,011 are each and all invalid.

(2) That the patents in suit and each of them, in respect to the claims sued on, are void for anticipation on the prior art.

(3) That the patents in suit and each of them, in respect to the claims sued on, are void for lack of invention over the prior art.

(4) That the alleged inventions of the claims sued on of the several patents in suit are disclosed in the following patents, viz.:

Guardino 1,300,164

Taylor 343,866

Goes 1,480,661

Gridley 63,629

Spellman 1,309,263

(5) That the claims of the Wasser patents in suit must be given a construction in accordance with the rule that "when a claim is so explicit, the courts cannot alter or enlarge it". (*Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274; defendant's brief, page 64). [125]

(6) That the bill of complaint be dismissed.

(7) That the cross-complaint or counterclaim be dismissed.

(8) That each of the parties is to bear its own costs.

MICHAEL J. ROCHE,

United States District Judge.

Dated: August 9th, 1940.

[Endorsed]: Filed Aug. 9, 1940. [126]

In the United States District Court,
Northern District of California, Southern Division.

In Equity No. 4295-R.

PEVELY DAIRY COMPANY, a Corporation,
Plaintiff.

v.

BORDEN PRINTING COMPANY,
a Corporation,
Defendant.

JUDGMENT.

This cause having come on regularly to be heard upon the proofs, documentary and oral, taken and submitted in the cause and being of record herein, both parties being represented by counsel, and the cause having been submitted to the court for its consideration and decision; and the court having made and filed herein its Findings of Fact and Conclusions of Law. [127]

Now, therefore, pursuant to such Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed as follows:

(1) That the claim of United States Letters Patent here in suit No. 1,923,856, dated August 22, 1933, is invalid for anticipation, lack of invention and lack of novelty.

(2) That claims, 4, 7, 8 and 11 of United States Letters Patent here in suit No. 1,829,915, dated November 3, 1931, are each and all invalid for anticipation, lack of invention and lack of novelty.

(3) That claim 3 of United States Letters Patent here in suit No. 1,999,011, dated April 23, 1935, is invalid for anticipation, lack of invention and lack of novelty.

(4) That the plaintiff, Pevely Dairy Company, assignee of said Wasser of the three patents in suit, is a Missouri corporation of St. Louis, Missouri.

(5) That the defendant, Borden Printing Company, is a California corporation of San Francisco, California, and for many years last past has been, and now is, engaged in an extensive printing business, selling, among other things, bottle collars.

[128]

(6) That the alleged inventions of the claims sued on of the several patents in suit are disclosed in the following patents, viz.:

Guardino, 1,300,164

Taylor, 343,866

Goes, 1,480,661

Gridley, 63,629

Spellman, 1,309,263

(7) That the bill of complaint be dismissed.

(8) That the cross-complaint or counterclaim be dismissed.

(9) That each of the parties is to bear its own costs.

MICHAEL J. ROCHE,

United States District Judge.

Dated: August 9th, 1940.

[Endorsed]: Filed Aug. 9, 1940. [129]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Pevely Dairy Company, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this case on August 9, 1940.

BOYKEN, MOHLER & GORDON,
KINGSLAND, ROGERS & EZELL,
Attorneys for Plaintiff.

[Endorsed]: Filed No. 4, 1940. [130]

American Surety Company of New York
Organized 1884.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, the Plaintiff in the above-entitled action is about to appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a Judgment entered against it in said action, in said United States District Court, Northern District of California, Southern Division, in favor of the Defendant in said action, on the 9th day of August, 1940.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does

undertake and promise on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding the sum of two hundred fifty dollars (\$250.00), to which amount it acknowledges itself bound.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 4th day of November, 1940.

In Case of a breach of any condition hereof, the above-entitled Court may, upon notice to said American Surety Company of New York, Surety hereunder, of not less than ten days, proceed summarily in the above-entitled action or proceeding to ascertain the amount which said Surety is bound to pay on account of such breach and render judgment against said Surety and award execution therefor.

AMERICAN SURETY COMPANY
OF NEW YORK.

(Seal)

By: /s/ W. J. CONKLIN,

Resident Vice-President.

Attest: /s/ B. DUCRAY,

Resident Assistant Secretary.

Bond No. 544658-K.

Premium \$10.00 per annum.

Approved as to form.

TOWNSEND & HACKLEY,
JACK C. HURSH,

Attorneys for Defendant. (Acknowledgment.)

[Endorsed]: Filed Nov. 7, 1940. [131]

[Title of District Court and Cause.]

POINTS TO BE RELIED UPON ON APPEAL.

On appeal, appellant will rely upon the following errors by the lower court:

1.

In finding claims 4, 7, 8 and 11 of patent No. 1,-829,915 and claim 3 of patent No. 1,999,011 invalid; and in failing to find them valid. [132]

2.

In finding said claims of said patents invalid for anticipation, lack of invention, or lack of novelty.

3.

In finding the inventions of said patents, or any of said inventions, disclosed in prior patents, and particularly in the following patents, or any of them:

Guardino, 1,300,164

Taylor, 343,866

Goes, 1,480,661

Gridley, 63,629

Spellman, 1,309,263

4.

In failing to find that all of said patents are in non-analogous arts, and in failing to find that they do not describe or suggest the inventions set forth and claimed in appellant's foregoing patents; in failing to apply the law of nonanalogous art to said patents; and in failing to apply the law that pat-

ents may not be invalidated on art not disclosing or suggesting their inventions.

5.

In invalidating appellant's patents on one patent, Spellman, over which they were allowed by the Patent Office, and on other patents no better than that patent.

6.

In invalidating the patents on art disclosing only one feature of appellant's claims, to-wit, the particular attachment means; in failing to realize that all the claims are combination claims including other features; and in failing to apply the rule that new combinations of old results may be invention. [133]

7.

In failing to find appellant's patents infringed by appellee's devices, as accused.

8.

In finding that the sole invention of two patents over a third lies in the locking means, in complete disregard of other specified and claimed differences.

9.

In failing to give effect to large commercial success and public recognition of appellant's patents.

10.

In failing to give effect to the fact that appellant's patents, including claims here in suit, were held

valid and infringed after full trial in the District Court for the Northern District of Ohio.

11.

In failing to give effect to the fact that appellant's patents were held valid by the said District Court in Ohio over substantially the same art as in this case.

12.

In failing to apply the law that the citation of over ninety-five alleged instances of prior art of itself indicates invention.

13.

In failing to apply the rule that the adoption of the patented construction in preference to all the prior art indicates invention.

14.

In finding that appellee acted in good faith in its infringement, whereas appellee actually manufactured the accused devices in the knowledge and face of appellant's patents. [134]

15.

In admitting Exhibit FF, a collar rejected from the suit because not supplied by appellee's Bill of Particulars in response to appellant's motion for a specification of all collars produced by appellee (Rec. 75, 76, 77), under the spurious and insidious theory that it represented a prior art construction (Rec. 170, 171), whereas it was actually made long

after the suit was begun, and could not possibly represent said prior art.

16.

In admitting Exhibit GG (Rec. 172) as of any value in representing the Guardino patent, whereas, as was urged, it is completely altered so as not to typify that patent, and is wholly and insidiously misleading.

17.

In admitting Exhibit II (Rec. 174) as of any value in representing the Taylor patent, whereas it is completely altered so as not to typify that patent, and is wholly and insidiously misleading.

18.

In admitting Exhibit JJ (Rec. 175) as of any value in representing the Goes patent, whereas it is completely altered so as not to typify that patent, and is wholly and insidiously misleading.

19.

In admitting Exhibit KK (Rec. 177) as of any value in representing the Gridley patent, whereas it is completely altered so as not to typify that patent, and is wholly and insidiously misleading.

20.

In admitting Exhibits LL and LL-1, being boxes, not having any connection with the case, and not having any status as prior art. [135]

21.

In dismissing the bill of complaint.

BOYKEN, MOHLER & GORDON,
Attorneys for Appellant

January 9, 1941

Received a copy of the above and foregoing Points to be Relied Upon on Appeal, this the 16th day of January, 1941.

ROY C. HACKLEY, JR.
Attorneys for Appellee.

[136]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 144 pages, numbered from 1 to 144, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case entitled Pevely Dairy Company, a corporation, Plaintiff, vs. Borden Printing Company, a corporation, Defendant. No. 4295-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of \$18.10 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 31st day of January, A.D. 1941.

(Seal) WALTER B. MALING,
Clerk.

WM. J. CROSBY,
Deputy Clerk.

[145]

Before: Hon. Michael J. Roche, Judge.

[Title of District Court and Cause.]

Tuesday, October 17, 1939

Counsel Appearing:

For the Plaintiff: Lawrence E. Kingsland, Esq.;
Edmund C. Rogers, Esq.; A. W. Boyken, Esq.

For the Defendant: Charles E. Townsend, Esq.;
Jack Hursh, Esq. [149]

OPENING STATEMENT FOR PLAINTIFF

Mr. Kingsland: The patents are three in number. The first one is 1,829,915. I shall refer to that as patent A. That patent relates to a display device having a particular form adapted, as I say, to being put over the standard milk bottle. That one is referred to as the pivoted connection form.

The other patent, patent No. 1,923,856, is a pat-

ent having only one claim, and it does not relate generally to the entire structure, but has to do with a particularly adapted means for holding the ends of the band together. That will be referred to as Patent B. (Note: No appeal is taken on this patent, 1,923,856.)

No. 1,999,011, the patent referred to as Patent C, has to do with the same general construction, with a different means for making it applicable to the standard milk bottle.

Now, two of these patents were in suit in Cleveland in 1936 and were sustained. They are A and C. The B patent was not there in suit. In addition to that there have been a number of suits that have been filed on one or the other of these patents, some of the suits based on A and C, B not having heretofore been in suit. They resulted in consent decrees. The litigation, however, in Cleveland was a full trial of the case, before Judge Jones, and there was a decision, which I shall refer to in more [150] detail, or, rather, a decree with findings of fact, at a later point. That, as I say, sustained the validity of A and C patents.

The Court: B has to do with detail, that one claim?

Mr. Kingsland: B has to do with the detail, and, as I say, has not been in litigation. [151]

That patent, 1,829,915, I shall formally introduce later. That patent is referred to as the pivoted connection patent. No. 1,999,011, which I shall refer to as C, accomplishes the same general result in a

different form. The other patent, I do not believe it will be necessary to go into any detail on it, because it is very simple. The structure is simple, and we have prepared a chart showing its applicability to certain of the structures of the defendant. [154]

Now, in presenting the case from the standpoint of infringement, we have prepared a chart, which I shall introduce in evidence later as a chart merely to follow the several claims that are here. I think if your Honor will look at that maybe I can explain a way in which we can use it. I am not going to stop for much detail on it now.

Now, there are several forms of these bottle collars that have been used by the defendant. They are in the record as a result of the Bill of Particulars, in answer to the Motion for Bill of Particulars, and what we have done in this chart, we have taken the claims that we rely on and have applied very graphically the claims to each part of the several collars that are involved. On the first sheet to the left is Claim 4 of patent A, No. 1,829,915, analyzed into its elements, and drawn off to the side are lead lines running to the portions of the collar of Plaintiff's Exhibit 3, which was an admitted device of the defendant. So your Honor can find, by following the lead lines to the portions defined by the claim—that same plan has been used throughout this chart. I will not need to delay in going over it, except simply explain by reference to Claim 4 as to the first patent the different parts that are defined in the claim. Of course, ordinarily we look to the diselo-

sures for a discovery of the invention, itself, the wording, of the claim being simply to summarize the patentable subject-matter. If your Honor looks at the detail [156] now on the first claim I will explain it. The application of the claim to the device is the same system being followed in other cases, so it won't be necessary to follow it through.

“A display device for application to a bottle having a cylindrical body portion”—the claim being limited by the purpose for which it was designed the introductory clause there is significant—“to a bottle having a cylindrical body portion”—this is the cylindrical body portion of the standard milk bottle—“a tapered neck portion defining”—this is the tapered neck, here—“defining an enlarged mouth”—this is the enlarged mouth—“and an enlarged top flange; said device comprising”—then we come to this—“comprising an arcuate piece of pliable material adapted to be formed into a truncated conical member having a lower diameter approximately equal to the diameter of the body portion of the bottle.” That is this portion designed so it will fit at this point; “An upper diameter approximately equal to an intermediate diameter of the tapered neck portion of the bottle”—that is here, so it will be held at that point—“Means for so connecting the ends of said arcuate piece as to hold the same in the form of the truncated conical member and permitting enlargement of the upper diameter of the member.”

That refers to that type of patent A that permits a separation or extension of the upper diameter in

order that it may go over the top and then fit the proper place on the bottle, so we have as a final result a very neat-appearing bottle containing the display matter at a proper place on the bottle.

The other claims, with their application to the various forms that have been employed by this defendant are contained in the other sheets of this particular chart. Claims 4, 7, 8, and 11 [157] are applied respectively to Exhibits 3, 4, and Defendant's Exhibit C. Those will be identified definitely by the same number when we come to introduce them, so the claims applied to the Exhibits to the right will permit your Honor to follow the application of the claims as they are interpreted.

Now, patent No. 1,923,856, which is referred to as B Patent, is applied to Exhibit 4, Exhibit 4 being an operating structure, the chart being an exact drawing of this structure of the defendant, which defendant has used, so that would mean the single claim of Patent B is applied to Exhibit 4, and, beyond that, there is no charge of infringement as to that patent.

Patent No. 1,999,011, which is referred to as C Patent, is charged to be infringed by Exhibits 20 and 21, and have already been introduced on this record by reports of the defendant, and your Honor will see the form of Exhibit 21 and Exhibit 22. With reference to this chart, I may say that in the Cleveland Case there were three claims that were in suit. In this case, in order to simplify the matter, we shall rely upon Claim 3 only. On patent A we

shall rely upon Claims 4, 7, 8, and 11 as applied to Exhibits 3, 4, and Defendant's Exhibit C, and as to B Patent, No. 1,923,856, we shall rely upon the single claim as applicable to Exhibit 4, and as to C Patent, No. 1,999,011, we shall rely upon Claim 3 as applied to Exhibits 21 and 22.

There is one other device, and that is not included in this chart. That device is marked Exhibit D, and is one of the devices submitted to the plaintiff. That is accused under Claim 4 of 1,829,915. There were other exhibits that were submitted, designated C and E by the defendant, and they are not accused under the present patents. All of these matters have been submitted to counsel on the other side, so there can be no confusion as [158] to just what is to be covered on our presentation of the case as to what claims we are relying upon, and what devices we are accusing as being infringed. [159]

Mr. Kingsland: We have stipulated to the use of soft copies of patents, that is, uncertified copies of patents. I understand counsel will admit the incorporation of the plaintiff.

Mr. Townsend: If you will state the date and the present status.

Mr. Kingsland: I have a certificate of incorporation, but it would seem unnecessary, on counsel's agreement, and we may state that the Pevely Dairy Company is a corporation of Missouri, and by a certificate dated August 14th of this year was

in good [161] standing as a corporation of Missouri. I take it that that will cover it?

Mr. Townsend: Yes. The date of incorporation, if you have it?

Mr. Kingsland: The date of incorporation is February 24, 1903. Before examining the witness I would like to make formal offers of the various documents upon which we will rely.

As Exhibit 1-A I desire to introduce in evidence the file wrapper and contents of patent No. 1,829,915, dated November 3, 1931, upon an application of Joseph J. Wasser, to the Pevely Dairy Company. I note, your Honor, that the patentee on the face of the patent is the present plaintiff in the case, so that I will not be required, as I understand it, to make proof of assignment from the applicant to the patentee, because on the face of it it is issued to the plaintiff in this case.

(The document was marked "Plaintiff's Exhibit 1-A".)

Mr. Kingsland: The drawings accompanying that application as originally filed are under separate certificate and are introduced in evidence as Plaintiff's Exhibit 1-B.

(The drawings were marked "Plaintiff's Exhibit 1-B.")

Mr. Kingsland: I desire to introduce in evidence as Plaintiff's Exhibit 2 file wrapper and contents of patent No. 1,923,856, [162] dated August 22, 1933, issued on an application of Joseph J. Wasser to Pevely Dairy Company, as assignee, the Pevely Company being the patentee in the patent.

(The document was marked "Plaintiff's Exhibit 2.")

Mr. Kingsland: That, if your Honor please, is the one we referred to as Patent B.

I also desire to introduce in evidence file wrapper and contents as Plaintiff's Exhibit 2-A, file wrapper and contents of patent No. 1,999,011, granted April 23, 1935, on an application of Joseph J. Wasser to Pevely Dairy Company as assignee, and that also shows the Pevely Dairy Company as patentee. [163]

(The document was marked "Plaintiff's Exhibit 2-A.")

Mr. Kingsland: I desire now to introduce in evidence one of defendant's devices admitted by the Bill of Particulars and marked heretofore in response to the Bill of Particulars as Plaintiff's Exhibit 3. [164]

(The device was marked "Plaintiff's Exhibit 3.")

Mr. Kingsland: I also desire to introduce in evidence a device that has heretofore been identified by the defendant as one made and sold by them prior to this Bill of Complaint, so the technical feature is there. That is Plaintiff's Exhibit 4.

(The device was marked "Plaintiff's Exhibit 4.")

Mr. Kingsland: I also introduce in evidence another device of the defendant admitted by the Bill of Particulars, and it was designated by defendants as Exhibit C, and I would like to have it introduced in evidence as Plaintiff's Exhibit 5-A. Have you any objection to that?

(The device was marked "Plaintiff's Exhibit 5.")

Mr. Kingsland: I desire to introduce in evidence under the designation Plaintiff's Exhibit 11 and 11-A to 11-E, respectively, the following documents: Exhibit 11, the final decree in *Pevely Dairy Company v. Wolf Envelope Company*, being No. 5251 in Equity entered in the United States District Court, Northern District of Ohio, Eastern Division, February, 1937, and related to the suit in which patent No. 1,999,011 and No. 1,829,915 were involved, also a certified copy. [165]

(The document was marked "Plaintiff's Exhibit 11.")

Mr. Kingsland: As 11-A I offer the Bill of Complaint in the same suit, showing the issues that were there involved.

(The document was marked "Plaintiff's Exhibit 11-A.")

As Exhibit 11-B the Answer of the defendant in the same litigation as Exhibit—

(The document was marked "Plaintiff's Exhibit 11-B.")

As Plaintiff's Exhibit 11-C, the Supplemental Bill of Complaint which I may say brought into the case both of the patents here involved as A and C.

(The document was marked "Plaintiff's Exhibit 11-C.")

As Plaintiff's Exhibit 11-D the Answer to the Supplemental Bill of Complaint in that litigation.

(The document was marked "Plaintiff's Exhibit 11-D.")

I also desire to offer as Plaintiff's Exhibit 11-E the interlocutory decree in that case.

(The document was marked "Plaintiff's Exhibit 11-E.")

Mr. Kingsland: Now, I desire to offer in evidence as Plaintiff's Exhibit 12 the findings of fact and conclusions of law certified in the same litigation.

(The document was marked "Plaintiff's Exhibit 12.")

Mr. Kingsland: Have you an objection?

Mr. Townsend: Let me see it.

Mr. Kingsland: I will show you all of these, Mr. Townsend.

Mr. Townsend: All I can say in regard to these papers regarding a suit to which we were strangers is that they are entirely incompetent, irrelevant, and immaterial. I don't make any point [166] of the fact they are not exemplified copies but certified copies.

The Court: Indicate for the purpose of the record the purpose of this offer.

Mr. Kingsland: Well, if your Honor please, the purpose of the offer is to show the issues were the same, and that the same patents were involved. It also was pleaded in the petition and it is admissible under the general theory of acquiescence.

The Court: I will allow them in subject to your motion to strike, and over your objection, so we will have a record.

Mr. Townsend: Exception.

Mr. Kingsland: I desire to introduce in evidence as Plaintiff's Exhibit 21 Defendant's device of collar that has been identified by that second bill of particulars.

Mr. Kingsland: I desire to introduce in evidence an additional device or collar of the defendant admitted to have been used prior to the Bill of Complaint, as Exhibit 22.

(The device was marked "Plaintiff's Exhibit 22.") [167]

Mr. Kingsland: They were brought in by Supplemental Bill. The pleadings will show that.

I desire to introduce in evidence certified copy of the proceedings in the case of Pevely Dairy Company v. Rusling Wood, Inc., being a case that was pending in the United States District Court for the Southern District of New York. In Equity No. 76-203. That was a suit on patent No. 1,829,915, being Patent A on this record, as designated. The record in that suit includes the defendant's answer, and shows what was in issue, and it includes the final consent decree, the decree having been entered on the 5th day of January, 1934. It is offered on the theory of acquiescence.

Mr. Townsend: I object to that offer. These consent decrees are absolutely useless. This carries no weight whatsoever, and merely incumbers the record.

The Court: I will allow it subject to your objection.

(The document was marked "Plaintiff's Exhibit 23.")

Mr. Kingsland: Your Honor, I desire to introduce in evidence true copy of the decree in *Pevely Dairy Company v. Spurgeon Tucker*, Civil Case File No. 3-314, District Court of the United States for the Southern District of New York, the decree having been entered on September 6, 1939.

Mr. Townsend: The same objection. [168]

Mr. Kingsland: That is introduced in evidence as Plaintiff's Exhibit No. 24.

The Court: The same ruling. It may be admitted and marked, subject to the objection of counsel.

(The document was marked "Plaintiff's Exhibit 24.")

Mr. Kingsland: I desire to introduce in evidence as Plaintiff's Exhibit 25 a collar made by Neher-Whitehead under the patent in suit.

(The device was marked "Plaintiff's Exhibit 25.")

Mr. Kingsland: There was a case pending in this Court that resulted in a consent decree, and I invoke the Court's judicial notice of that file; that shows a consent decree entered in the case of *Pevely Dairy Company v. Manhard*, being No. 3956-L in this Court.

Mr. Townsend: The same objection to that. [169]

MORRISON H. STEWART,

Called by Plaintiff. Sworn.

Mr. Townsend: Mr. Rogers, do you object to stating the substance of what you expect to prove by this witness?

(Testimony of Morrison H. Stewart.)

Mr. Rogers: No. It is merely that he will testify to his experience with the use, in other words, the use of bottle collars.

Mr. Townsend: Well, there is no question, your Honor. The defendant uses bottle collars and the plaintiff uses bottle collars.

Mr. Rogers: Are you agreeing, I take it you are conceding the utility of these bottle collars and their extensive commercial success by your objection?

Mr. Townsend: I am not contesting the utility, because it is recognized. We are certainly denying novelty. [170]

Mr. Rogers: Let the record show that counsel agrees to the utility of the device.

Q. Mr. Stewart, will you state your occupation?

A. I am a member of the firm of Exhibitors Art & Design Service, an advertising company.

Q. What is the nature of your connection with that business? Rather, what is the nature of your activities in that business?

A. A matter of designing advertising material of various kinds.

Q. Will you state what connection, if any, you have ever had with the dairy industry?

A. From the period of 1925 until 1938 I was advertising manager of Golden State Company, Ltd., a dairy products concern in San Francisco. They have plants located in all the principal cities of California to the number of about twenty.

(Testimony of Morrison H. Stewart.)

Q. Do you remember the circumstances in which you first came across the so-called bottle collar?

A. If I recall correctly, it was sometime around 1930. That was the collar manufactured by Neher-Whitehead Company.

Q. So far as you know, did you or did Golden State Company have any knowledge of bottle collars prior to that time? [171]

A. So far as I know there was no previous collar that came to my knowledge or the company's knowledge.

Mr. Rogers: Q. What grew out of your learning of bottle collars?

A. After seeing the sample of bottle collar we decided on use of the bottle collar rather extensively. I am speaking of the company.

Q. What forms of advertising did the Golden State Company use prior to its adopting this bottle collar?

A. Advertising falling into that same qualification, I presume you mean?

Q. Yes.

A. For the purpose of reaching the ultimate consumer of milk in the home we used what is ordinarily called flat hanger; in other words, a piece of paper with a die-cut hole in the top, which slipped over the neck of the bottle and hangs down along the edge of the bottle.

Q. Why did you adopt bottle collars? [172]

(Testimony of Morrison H. Stewart.)

A. The reasons were (1) the ease of application. In other words, it was an easy piece of advertising material to apply to the bottle, and, secondly, because we had greater proof of the advertising piece entering the home, not being blown off or lost after being placed on there by the employee handling the bottle.

Mr. Rogers: Q. Did you ever see the bottle collars applied to the bottles, in your experience with the company? A. Yes.

Mr. Rogers: Q. Were you responsible for the adoption of bottle collars by the Golden State Company at the time they were adopted?

A. Yes. It was upon my recommendation.

The Court: Recommendation to whom?

A. Recommendation, your Honor, in the sense that it was an approved item in the advertising budget which I prepared.

The Court: You had mainly to do with that budget?

A. Entirely so, yes.

Q. Who were you responsible to in the company?

A. The President of [173] the Company.

The Court: Proceed.

Mr. Rogers: Q. As part of your duties involving the advertising of the company, did you investigate how these collars were applied to the bottles?

A. Yes.

Q. Will you explain how that was done?

A. Two methods were employed. In the case of large plants, a man was employed in the plant to drop

(Testimony of Morrison H. Stewart.)

the collar over the neck of the bottles as they emerged on the continuous conveyor from the point at which they were filled, and prior to being placed in the cases for carrying them, which were then put into the wagon. In the case of smaller plants they were given in a package to the driver, and he would drop one of these over each bottle as he made the delivery.

Q. Will you describe these cases? Do you call them "crates"? A. Cases.

Q. And the arrangement of the bottles within those cases?

A. The cases are ordinarily made of wood, with cross wires, very heavy cross wires inside the case, to separate the bottles so they would not jar one against the other. The cases ordinarily hold twelve quart bottles of milk.

Q. I assume that each one of the places into which a bottle is fitted is square? A. Yes.

Q. How big, relative to the diameter of the bottle, are those squares?

A. They would be about three-eighths to half an inch larger than the circumference of the bottle, than the diameter of the bottle.

Q. When the bottles were put in the crates did they have the bottle collars on them?

A. In some instances they did, as was mentioned a few moments ago.

Q. Did they have ice on them? Do you ice your crates here? [174]

(Testimony of Morrison H. Stewart.)

A. During the warm weather cracked ice was put on top of the bottles.

The Court: How many days, approximately, does the icing occur here?

A. Oh, on an average of 60 days.

The Court: I did not think it was that much.

The Witness: Some of the trucks stay out a great many hours.

The Court: Oh, I see.

Mr. Rogers: Q. In your experience, did you put the flat hanger type of advertising device on the bottles prior to the time they were put in the crates?

A. No. It was not possible to put the flat hangers on the bottles except at the time of delivery.

Q. What did your experience show as to the percentage of the flat hangers that actually reached the customer?

A. As related to those—

Mr. Townsend: Your Honor, that is hearsay.

Mr. Rogers: Q. Did your company ever make an investigation of this? A. Yes.

Q. And did that investigation come to you?

A. It did.

Q. Did your company act on the basis of that investigation? A. Yes.

Q. What was the result of that investigation?

Mr. Townsend: He doesn't know anything about that investigation even being made.

Mr. Rogers: He just testified it was made.

Mr. Townsend: He started to say what he was told. We are only trying to exclude hearsay evidence.

(Testimony of Morrison H. Stewart.)

If this man went out and saw those things it is competent. If he did not go out to see them it is incompetent.

Mr. Rogers: It is not shown he did not go out. I put the question to him was he a part of the investigation. [175]

Mr. Townsend: Well, you interrogate the witness and I will make my objections.

The Court: Read the question, Mr. Reporter.
(Question read.)

The Court: What investigation?

Mr. Rogers: Q. The investigation as to the effectiveness of the flat hanger.

The Court: Was there any investigation in that regard? A. Yes.

Q. Who made the investigation?

A. The various plant managers and the foreman.

The Court: Develop it and lay the foundation.

Mr. Rogers: Well, of course, the additional question is, Did you participate in that investigation as advertising manager?

A. To the extent of receiving the reports, sir.

Q. Did you act on the basis of that investigation? A. Yes.

Mr. Townsend: That is a conclusion on hearsay. I think you can get it some other way, but don't do it by hearsay.

Mr. Rogers: Q. How often did you use these flat hangers?

(Testimony of Morrison H. Stewart.)

A. Oh, I would say on the average of about half a dozen times a year.

Q. When you adopted the bottle collars how often did you use them? [176]

A. On an average of once a month to begin with, and later more often.

Q. What was the relative price of the bottle collars as compared with the flat hangers at the time you decided on bottle collars?

A. They were slightly more expensive.

Q. During your experience with the company, to what extent, if any, did the bottle callars supersede the flat hangers? A. Almost entirely.

Q. Was it a part of your duties to know the effectiveness of the advertising the company did?

A. Yes.

Q. In performing that part of your duties, what did you learn as to results produced by bottle collars as compared to those produced by the flat hangers.

A. We gained greater results from the bottle collars than from the flat hangers.

Q. And what do you attribute that result, the greater result, to?

A. The fact that more of this type of, or piece of advertising reached the ultimate consumer than the use of the other types.

Q. How much more would you say, how much greater a percentage would you say of the bottle collars reached the consumer than the flat hanger?

Mr. Townsend: He is incompetent to testify to that.

(Testimony of Morrison H. Stewart.)

The Court: You can develop it on cross-examination.

Mr. Townsend: I object to it, no proper foundation laid.

The Court: I will allow it in the interest of time.

A. I should say 50 per cent.

Mr. Rogers: 50 per cent. greater. Your witness, Mr. Townsend. [177]

Cross-Examination

Mr. Townsend: Q. Have you a sample of one of these paper hangers that you were talking about? A. No.

Q. Can you describe it briefly so it will be intelligible to the Court?

A. It consists of a light piece of cardboard or heavy paper about 4 inches by 9 inches, with a round hole cut in the top, large enough to slip over the top of a milk bottle.

Q. Milk bottles all had flanges on them which had to be embraced by the hanger when it was slipped over?

A. Well, the fact the neck is smaller than the body of the bottle prevented it from falling.

Q. The bottles on which your hangers are used also had the same kind of neck and flange that the bottles have to-day? A. That's true.

Q. Those hangers carried the same sort of information to the customer, did they not, that the large collar carries? A. Yes.

(Testimony of Morrison H. Stewart.)

Q. Advertising? A. Advertising message.

Q. A message. Do you not know that the Golden State is still using paper hangers? A. Yes.

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Q. When you spoke of the advantages that you thought the collar had over paper hangers weren't those advantages more or less incident to some particular article or particular type of message you wanted to convey?

A. No. It is not a matter of the message so much as the ability of the piece of advertising to reach the consumer.

Q. And also to apply to the article that was used? A. Yes.

Q. Was not the article, itself, did it have some relation—

A. You mean the article being advertised?

Q. Would not the container to which this hanger was to be applied have something to do with the use of it, whether it was used or not, with reference to a collar? A. No, since—

Q. So far as you know. You don't know about that? A. No, I don't.

Q. You say you were with the Golden State for a number of years. When did you leave there?

A. January, 1938.

Q. What was the cause?

A. The management and myself decided to disagree on certain principles, so I resigned.

Q. You carry some ill feeling toward the Gold-

(Testimony of Morrison H. Stewart.)

en State as a result of your severance of employment there. A. Not at all.

Q. You don't think that has affected your testimony here to-day in any way?

A. No, not at all.

Q. From whom was Golden State purchasing its collars when you left there?

A. My memory of the last purchase of collars while I was there was from the Manhard Printing Company.

Q. Prior to that from whom did they purchase?

A. Neher-Whitehead Company.

Q. That is Neher-Whitehead Company you spoke about. Who are they?

Mr. Rogers: Your Honor, I don't think this has any particular relevancy to the direct examination. I have no objection [179] to his going into it.

The Court: I will allow it.

A. Neher-Whitehead Company is a printing concern in St. Louis, Missouri.

Mr. Townsend: Q. That is Neher-Whitehead?

A. Yes.

Q. And it was they who solicited you, or solicited Golden State to purchase their collars at that time?

A. Yes.

Q. How many years prior to 1930, whenever that occasion was that you had been using, these other types of hangers?

A. For a period, I should say, of about three years.

(Testimony of Morrison H. Stewart.)

Q. Three years. Had you bought large purchases of those, large numbers? A. Yes.

Q. Could you state the number that you had purchased and the approximate value in those three years of these hangers?

A. That would be very difficult to do.

The Court: Approximately.

A. Quantity and cost?

The Court: Yes.

Mr. Townsend: Yes.

A. I should say probably 800,000 and approximately at a cost of about between \$1.75 and \$2 per thousand.

Q. Prior to the use of hangers did your company use the milk bottle, or did you have any knowledge about the practice before that?

A. No, I had no knowledge of anything prior to that.

Q. When you went there in 1925 were they still using hangers?

A. At that time the company was not distributing milk; did not enter the distribution of milk until 1927.

Mr. Townsend: That's all.

Redirect Examination

Mr. Rogers: Q. Just one question I wanted to ask you with respect to the Golden Gate Company continuing to use some flat [180] hangers during certain occasions. Under what circumstances were those hangers used?

(Testimony of Morrison H. Stewart.)

A. Primarily for announcing price changes in milk, and other dairy products delivered to the home.

Q. Why did you use the hangers then instead of collars?

A. Because of the fact that they had to be produced within twenty-four hours, and sometimes later, and you could obtain them from any printer in that period of time.

Q. Could you obtain the collars within a corresponding period of time?

A. No, you could not obtain collars in that short period of time.

LEROY PASTEUR NEHER,

Called by Plaintiff, sworn.

Direct Examination

Mr. Kingsland: Q. Will you state your full name, residence and present occupation?

A. Leroy Pasteur Neher, St. Louis; Vice-President and Operating Head of Neher-Whitehead Company, St. Louis.

Q. What is your age, Mr. Neher. A. 43.

Q. Will you tell the Court what type of business is conducted by your company?

A. Sales and advertising work for the Dairy industry almost exclusively.

Q. How long have you been engaged in that business? A. Since 1924.

Q. Will you detail generally the experience that

(Testimony of Leroy Pasteur Neher.)

you have had in connection with the dairy industry, particularly with respect to advertising?

A. You mean how we got into it?

Q. No. I say detail generally the experience that you, yourself, [181] have had with the advertising end of the dairy business?

A. Well, we have been in the business of preparing this direct sale material for dairy products all over the country since 1924.

Q. What part have you, yourself, played in that?

A. Oh, well, I am the Vice-President and operating head and charge of sales.

Q. Well, state whether or not that has placed you in touch with dairies throughout the country?

A. It does.

Q. And has since that date? A. It has.

Q. What was the first form of advertising device, if any, that you know of that was used in connection with the ordinary milk bottle?

A. These flat hangers.

Q. Usually, what did that consist of?

A. Either a piece of paper or a cardboard with a hole punched around it, and it slipped over the top of the bottle.

Q. Can you state whether or not, from your own information, that was satisfactory for the purpose of advertising milk products?

A. The difficulty was that it was inefficient in that 25 to 40 per cent. of the hangers actually reached the consumer.

(Testimony of Leroy Pasteur Neher.)

Q. Well, what were the reasons; give the details, if you know them, the reason that this flat hanger that was used was not efficient?

A. In the first place, the dairy management, sales department, advertising department, had to depend upon the driver——

Mr. Townsend: Now, I object to what the people had to depend on. You are telling what you know, personally, and not what somebody else has told you, or second-hand information.

A. I have been in the dairy business myself almost since 1924. I have called upon dairies all over the country.

Mr. Kingsland: Q. Well, you can explain your answer as to what you know and the basis for your experience in the industry.

A. I see. As I said, the flat hangers have to be placed on the [182] bottles by the wagon driver of the dairy; they cannot be placed on in the plant.

Q. What results from that with respect particularly to the amount of distribution?

A. As a result of that, because the wagon drivers have so much to do, and haven't the time to put these on, it is accepted in the industry that the efficiency of the flat hanger is 25 to 40 per cent., 50 per cent. at the most.

Mr. Townsend: We take this, of course, as the witness' opinion because he has no figures.

The Court: He is testifying as an expert.

Mr. Kingsland: Well, the witness has been in

(Testimony of Leroy Pasteur Neher.)

the industry. I did qualify him as one who had been in the industry for a period of time.

The Court: It goes to the weight of the testimony. You can cross-examine him as to where he ascertained his percentages, the method and manner which he does it. It goes to the weight of the testimony. Proceed.

Mr. Kingsland: Q. What was your first knowledge of the so-called bottle collar?

A. In 1928 the Neher-Whitehead Company was at that time in the advertising business. [183] We put out a sales house organ, you might term it, and syndicated it to dairies, like, for instance, the Golden State Company. We put out about 10,000 of them, and used to send them out to our customers. It was a good will sales organ for the local dairies. We put out another service which was a big part of our business at that time, it was a house organ sold to creameries and milk plants, and dealing with the procurement of milk and cream from the sales end. That was our big business prior to 1924. We added this sales service, and another service, and around 1926 or '27 we were going along nicely with this sales service, but ran into trouble with the dairies——

The Court: 1929? A. 1926 and '27.

The Court: Oh, I thought you said '29.

A. The difficulty was dairies like our big companies, they had no way of distributing other products to their customers. They could not depend upon

(Testimony of Leroy Pasteur Neher.)

the drivers to do it, because the driver doesn't like the flat hanger. It was inefficient. So in 1928 we were calling on one of our customers, the Pevely Dairy Company, who also used this sales organ, and on his desk, on Mr. Wasser's desk I saw this——

Mr. Kingsland: Q. Mr. Wasser was who?

A. Mr. Wasser was the advertising and sales manager for the Pevely [184] Dairy Company.

Q. He is the applicant for the patent in suit?

A. Yes. I called on him and happened to see the bottle collar on his desk. I said to him, "Joe, where did you get that?" He said, "Well, we have"——

Mr. Townsend: Well, now you are getting on dangerous ground.

A. Oh, all right, sir.

Mr. Townsend: Don't state conversations.

A. Well, I realized this was just the thing that we had been contacting the industry on for years, just as soon as I laid my eyes on that I saw instantly that that was the answer to our problem, so we made a contract with the Pevely Dairy Company at that time, that was in 1928, for the exclusive right, and started off with the bottle collar business.

Mr. Kingsland: Q. Well, now, will you tell what the features of the structure were that impressed you at that time?

A. That bottle collar, that general type was such a thing that would go over the bottle, fitting it snugly, like a glove, and also because of the snug fit, and if made out of the proper paper it would withstand water, ice and moisture, and it can be put on in the plant nicely. From a practical stand-

(Testimony of Leroy Pasteur Neher.)

point, as I saw it, it was 100 per cent efficient in reaching the home of the customer. It wouldn't blow off the bottle. It won't be affected by the crate partitions, and you get it on in the plant.

Q. From your knowledge of how these collars were put on in the plant, will you give us a little detail of how the milk distribution is handled and how these collars are put on to accomplish the purpose that you stated?

A. Milk, of course, comes from the filler and bottles come up from the washer, up to the filler. The man in the dairy puts the bottle collar on between the bottle [185] washer, as the bottle comes from the washer to the filler, simply because in certain plants they have a conveyor; the conveyors for certain types of containers are located between the bottle washer and the filler, and then there are nothing but very short conveyors going into the hardening room from the filler, whereas in other places they have the conveyor after the filler, so the operator, whoever was putting on the bottle collars, drops them on wherever they have a chance to do so.

Q. Well, now, why is it that this bottle collar, from your knowledge, lends itself to being put on at the dairy and it then stays in there until its receipt by the housewife, just why is it that that occurs?

A. Because the shape that this bottle collar, the general shape a bottle collar of this kind takes fits

(Testimony of Leroy Pasteur Neher.)

it to the shape of the bottle, itself, so it fits snugly, like a kid glove.

Q. Is there any particular problem involved on account of the shape of the standard milk bottle?

A. Yes. The head of the bottle, it is over-size——

Q. You mean the flange around the top?

A. The flange around the top, yes.

Q. Has it been your experience that collars you produce under these patents are adapted to fit over the variations that occur in the top of these bottles?

A. Yes, that is correct.

Q. Is that one of the requirements?

A. That is one of the requirements; one of the main requirements.

Q. You spoke about the bottle collar staying on where the crate is iced. Will you make a little explanation of what you mean by that?

A. In the South, in our section of the country during the summer, all summer the bottles have to be iced; all milk is iced, it just could not withstand the heat, and ice is put into the cases, [186] just shoveled in, and stays there until the milk is delivered with these bottle collars. They are made out of a special paper and after all of our many years of experience they are now water-proofed, ice-proofed, and moisture-proof; they resist water, heat, and moisture, so when the bottle collar reaches the home it appears to be and is in good shape.

Mr. Kingsland: Q. Well, now, will you explain why it was that these hangers that you speak of

(Testimony of Leroy Pasteur Neher.)

were used prior to this time for this advertising purpose, why they could not be put on at the dairy and why they wouldn't stay on?

A. Well, a hanger is a flat piece of paper with just a hole in it. It would be like a sail on a boat. When it goes over the head of the bottle, why, it would stick out cross-wise, or flopping down, so if it were put on the plant the case partitions would cut the hanger all to pieces; also, by the time the bottle collar or the flat hanger got to the house if the driver put it on in the plant it would be wet and in a very unsightly condition, simply because it is fashioned to the bottle more or less like a cross-wise sail.

Q. In 1928 when you first had this called to your attention had you, as an advertising man in the dairy industry, been looking for some satisfactory advertising medium for the business? A. Yes.

Q. You have stated that you were impressed at the time you first saw this as a solution for that problem? A. Immediately, yes.

Q. In other words, were you able to recognize it as meeting the requirement when you first examined it? A. Instantly, instantly.

Q. Now, in what year did you actively become interested in commercializing the bottle collar?

A. In 1928, in the fall of 1928 and early winter.

Q. There has been introduced as Plaintiff's Exhibit 25,—I will ask [187] you whether or not that is generally representative of the bottle collar such as commercialized by you? A. That's right.

(Testimony of Leroy Pasteur Neher.)

Q. Do you recognize that collar? A. Yes.

(An adjournment was here taken until tomorrow, Wednesday, October 18, 1939, at ten o'clock a. m.)

[188]

Wednesday, October 18, 1939.

LEROY PASTEUR NEHER,

recalled.

Direct Examination

resumed.

Mr. Kingsland: Q. Mr. Neher, when we closed last evening we were speaking of the experience that you had in the exploitation of this device commercially. I wish you would continue and give in detail just how you put this device on the market, and how you commercialized it, and what the results were.

A. In the fall of 1928, after we concluded our arrangement with Pevely Dairy Company to use the device, we talked it over with our company, experimented with different types of paper, and drew up six designs featuring the dairy products that we had already featured in our other sales material. Then I jumped on a train and went to Chicago to see the leading dairy plants, then to Minneapolis, or to Milwaukee, Minneapolis, Detroit, Schenectady, Boston, New York, Baltimore, Washington, Philadelphia, Pittsburgh, Cincinnati, Indianapolis, and St. Louis. When I called on the dairies at that time I showed them what we had. Our bottle collars, of

(Testimony of Leroy Pasteur Neher.)

course, were just blank pieces of paper, just rough layouts. We asked several of them to check the shape of the collar and to check the paper stock, put them on the bottles, and see if they withstood water, ice and moisture, and also asked them to report to us. At the same time that I made these calls I endeavored, of course, to secure their business. In the six designs one happened to feature milk, the other featured cream, the other featured whipping cream, the other featured buttermilk, the other featured cottage cheese, all the products, and one featured the return of the empty bottle. When I returned to St. Louis, I believe it was in November——

Q. Of what year?

A. 1928. We proceeded to get our production [192] into shape and to further contact our prospective customers that I had called on, to get their orders, and we received orders from the bulk of these dairies, and started our production. We made deliveries on those orders, those 1928 orders, in May of 1929, and during 1929 we sold, I believe, fourteen million bottle collars.

Q. Did that demand arise simply through the efforts that you have detailed, or was there any major amount of additional advertising in this matter?

A. Well, that demand, in itself, was—at the time rather than to theorize we went right to the large dairies and presented it to them.

(Testimony of Leroy Pasteur Neher.)

Q. That was the reaction you got from the dairies on account of these personal calls?

A. Yes, just by those personal calls. Also, at that time, when I returned to St. Louis we didn't have the time to go all over the country, and inasmuch as we knew the dairy industry I wrote to a number of my clients and customers in various sections of the country, just a personal letter to obtain the same information from them that I endeavored to get from those I had called on; also orders.

Q. What was your experience with respect to repeat orders from the various dairies who purchased initially from you?

A. Why, those dairies, for the most part, came through with the six collars that we had to offer at the time. In other words, if they were going for buttermilk they would take one for buttermilk. If they were to sell their cottage cheese or their chocolate milk, or cream, whipping cream or milk, they would order the proper one.

Q. Over the period of time from the beginning of the commercialization of the collar, will you mention some of the dairies or other concerns that have standardized on this collar? [193]

A. After we had our initial connection with the collars our first customers represented a clientele which was distributing all over the country. When we turned out our first production in large runs, that is, in May, we had orders from Los Angeles, we had orders from Seattle, we had orders from Denver, we had orders from Minneapolis, we had orders

(Testimony of Leroy Pasteur Neher.)

from Texas, every section of the country. Then, of course, we started calling on the various dairies, ourselves. We just had myself and, locally, another man between 1924 and 1928, and we, of course, had built up our own line of dairies, and we solicited these by mail, so it wasn't very long before we found that the dairies that we had originally sold the six designs to were calling for more, and it wasn't very long until we found that it was necessary for us to have quite a portfolio of bottle collar designs. That is, we would have three to four on milk, three to four on cream, and cottage cheese. We started out with six, because cottage cheese was one of the by-products that the dairies could make a lot of profit on.

Q. Now, detail, or just give us a general idea of the type of industry or concern that purchased these collars through your company.

A. Well, as I say, when we found we were called upon to get up a number of designs featuring various products for what those dairies could use, one right after another, it was fortunate that we had got in touch with the larger dairies originally, so we could get up programs for them, and they were more inclined toward that than a smaller dairy at that time, but just as soon as we got up these programs of twelve to twenty-four bottle covers a year then the smaller dairies took it up. You see, when you start a business of this sort and get up twenty to twenty-four designs it requires extensive art work and plates, and these large dairy customers of

(Testimony of Leroy Pasteur Neher.)

ours, taking a million dollars, made it [194] easy for us to have this material available to dairies at large, although I did not make plans for dairies at large. In other words, we would either take a program of twelve bottle collars a year, that is, one a month, or twenty-four a year, two a month, or thirty-six a year, three a month, or forty-eight a year, four bottle collars a month, and we arranged the order and the program of the bottle collars. We found when we would call on smaller dairies or get in touch with them by mail all they would have to do would be to send their money and take such programs.

Q. I think we have developed enough of that, Mr. Neher. What I am inquiring about is to give us the names of some of the concerns, or dairies, or other concerns who have standardized on these bottles, if they have standardized.

A. Well, that is practically every large dairy in the country. If you want the larger dairies, the National Dairy, with headquarters in New York, they have plants in New York, in Washington, Baltimore, Cleveland, Boston. We serve many of those plants. The National Dairy owns them.

Q. Has there been a continual demand for these collars? A. Yes.

Q. Name some others.

A. The Borden Company.

Q. That, of course, is not connected with this defendant?

(Testimony of Leroy Pasteur Neher.)

A. No. That is the Borden Company that is in the dairy business in Canada and in this country. I mean in San Francisco, here; in New York, all over the country. The Beatrice Milk Company, they have 26 plants in 10 states. We have been putting out a bottle collar program for their entire territory for five straight years.

Q. Outside of the industry are there any organizations or concerns who have adopted the collar as a medium of advertising?

A. The bottle collar. Yes. The dairies took that up so quickly [195] that there are a number of other concerns who are really outside the dairy industry, but they sell a product to the dairies, such as the chocolate syrup concerns. These concerns supply chocolate syrup to dairies, and the dairies mix it with milk and sell it as a chocolate drink. There are three very large outfits that do that. They use our bottle collars by the million. They furnish the bottle collars to their dairy clients. The price of the product of chocolate syrup includes the merchandising plan for the dairy, and these concerns, rather than let the dairies sell the products, themselves, provide the merchandising program for them. Now, until the advent of this bottle collar these concerns could not do anything—

Q. For example, are any of the organizations, like the Red Cross, or community funds using—

A. Yes, they are interested in it and have been for the past seven years. The Red Cross, that is, the headquarters in Washington, D. C., have stand-

(Testimony of Leroy Pasteur Neher.)

ardized on our bottle collars. I mean by that that each year we get from them the design or the theme of their work for the year, their program for the year. We, in turn, make a bottle collar design which ties in with that theme. We submit it to the national headquarters in Washington for their approval. Then we run off samples, and we send the 3000 samples each year to the national headquarters. They insert those samples in their material which goes out to the Red Cross units all over the country. Now, in connection with bottle collars of that type, we had to be very careful when we started out, and we do to-day, since the theory— [196]

Q. I will ask you to state, if you know, why such organizations as the Red Cross standardize on these bottle collars?

A. They do it because the dairies are usually hooked up with local committees. The dairies knew what the bottle collars were doing, because they were buying them from us. Therefore, when the Red Cross drive comes along they order bottle collars from us. Now, we do not sell or solicit dairies for Red Cross bottle collars. That is all done by the Red Cross people. We do the same thing with the community funds and the Christmas seals, that is, the Tuberculosis association. We have done that for five years. The other outsiders, such as New York State, for two years, that was in 1936 and 1937, the State of New York, the Milk Control Department uses it for such campaigns.

(Testimony of Leroy Pasteur Neher.)

Q. Well, I believe you have mentioned enough to show that it was outside the industry. That is the point of my question. Now, I want you to give some idea of the extent of the distribution of these collars. I don't mean in dollars and cents, but territorial distribution.

A. We sell our bottle collars in every state in the Union, in Canada, and in Honolulu.

Q. Has that been true for a number of years past? A. Yes.

Q. Mr. Neher, did you at my request prepare a schedule showing the quantity of the bottle collars sold? A. Yes.

Q. Together with the dollar value. First let me ask you whether [197] you have charge of the records of your company.

A. Yes, I have.

Q. I show you this schedule that you furnished me, which I will ask be marked for identification as Plaintiff's Exhibit 26 for identification.

(The schedule was marked "Plaintiff's Exhibit 26 for identification.")

Q. I will ask you whether these figures are correct with respect to the quantity and value over the years from 1929 and for the first seven months of 1939, inclusive. Are those figures correct?

A. These figures are correct, and have been audited by our auditor, and the Pevely auditor.

Mr. Kingsland: I am now offering the paper as having been authenticated by the witness. I simply presented it before for identification by the witness.

(Testimony of Leroy Pasteur Neher.)

The Court: It will be admitted and marked.

(The document previously marked "Plaintiff's Exhibit 26 for identification" was received in evidence and marked "Plaintiff's Exhibit 26" in evidence.)

Mr. Townsend: I reserve an objection to it as incompetent, [198] irrelevant and immaterial.

Mr. Kingsland: If the Court please, without going into the odd figures, I would like to call the Court's attention to the fact that over the period of time from 1929 inclusive of seven months of 1939 there were 437,659,000 bottle collars sold with a total value of \$1,050,800, roughly.

Q. Now, what has been your experience with respect to the industry generally recognizing the patents and refraining from any invasion of them?

A. Well, we have had very few suits in the course of time. We find, of course, that from time to time that a local printer will put out a bottle collar, and what we do is call upon him and try to give him the facts.

The Court: You usually talk them out of it?

A. Yes, we do, and then they say they did not realize that such a simple thing like this was taking the hold that it was in the industry, and so they more or less recognize it.

Mr. Kingsland: Q. Will you state with respect to the local territory, the Western territory, has that been covered through your organization, and if so for what period of time?

(Testimony of Leroy Pasteur Neher.)

A. We have covered the West Coast ever since we started. We don't localize in any section. Our business is national. Our first order in the first run was to the Ador Creamery at Los Angeles, in 1929. Then to Christofferson, at Seattle, and the Golden State, that was in 1930, and Marin-Dell, here, in 1931.

The Court: Golden State and Marin-Dell, how much did they purchase, approximately?

A. I have got some figures. We sell 163 dairies in California.

Q. And you have been doing that how long?

A. Since 1923. That does not mean that we sold 163 dairies.

The Court: I understand.

A. In 1929, but we cover it, and we have our man out here and our prospects and customers [199] in California, according to our own mailing list now, is 868 in the State of California, alone.

The Court: No wonder our industries are limited.

A. I would like to make one point there, if I may.

The Court: Proceed.

A. We don't hurt the local industry. These particular bottle collars, as developed, are a specialty with us, that is, a dairy specialty, and so we have made the local dairies merchandise-minded.

The Court: Where do they buy their merchandise?

A. They buy other stuff locally.

The Court: What other stuff do you mean?

(Testimony of Leroy Pasteur Neher.)

A. Their pamphlets and their signs.

The Court: The collars, I am talking about.

A. Well, the bottle collars they buy from us.

The Court: Well, that is all we are interested in, these bottle collars, here. They take the bottle collars 100 per cent from you. I beg your pardon for interfering.

Mr. Kingsland: Well, I am glad the Court asked the question.

Q. Now, Mr. Neher, yesterday there was some reference made to the hanger. I asked you to prepare out of paper an example of what was referred to as the hanger. I will mark for identification two strips of paper as Plaintiff's Exhibit 27 and 27-A.

The Court: This is off the record.

(Discussion off the record.)

Mr. Kingsland: May the record just have an example of it? I thought probably the verbal description was not clear yesterday. I will ask with respect to these Exhibits 27 and 27-A whether they do represent the form of hanger that was referred to in testimony yesterday.

A. Yes. Of course, there are various types, but these represent the general form of a flat hanger.

Q. I have here a bottle, and I place the opening over it in that [200] manner and ask you whether or not that was the way they were used.

A. Yes.

Mr. Kingsland: For illustrative purposes I would like to formally introduce these.

(Testimony of Leroy Pasteur Neher.)

The Court: They may be admitted and marked.

(The strips of paper were marked, respectively, Plaintiff's Exhibits 27 and 27-A.)

Mr. Kingsland: You may inquire, Mr. Townsend.

Cross Examination

Mr. Townsend: Q. You stated that your company has the exclusive right under these patents in suit.

A. Yes, sir.

Q. Will you explain that further, what you mean by that answer?

A. When we saw it there at the Pevely Dairy Company I immediately endeavored to secure these exclusive rights to it under a contract, and we made a contract with them.

Q. Can you give us a description of the contract in the way it is exclusive?

A. It is exclusive in that we have the exclusive right to manufacture and to sell it in this country.

Q. Throughout the United States?

A. Throughout the United States.

Q. And territories? A. Yes.

Q. Exclusive right to make and sell and the exclusive right to sell it? A. Yes.

Q. Nobody can, without your permission?

A. Without our permission.

Q. Operate under these patents in any way, shape, or form. A. That's right.

Q. You have no licensees or sub-licensees?

A. Yes, we have.

Q. You have sub-licensees? A. Yes.

(Testimony of Leroy Pasteur Neher.)

Q. Have you that contract here?

A. I think the attorneys have it. [201]

Q. It is in writing? A. Yes.

Q. You recall the date of it?

A. No, I don't.

Mr. Townsend: Well, I call upon counsel to produce that contract.

Mr. Kingsland: Now, if the Court please, I think counsel has known of the license for a good long while, and we don't know whether we have it available here. In any event, it seems immaterial, because, under the law, the record owner, that is, the owner of the patent, has a right to maintain a suit irrespective of whether a licensee is joined or not. A licensee may be a proper party, but it is certainly not a necessary party, and it was an issue that should have been raised if counsel desired to raise it at an earlier stage in this case. I don't really know whether we have a copy of the license here, or not. We allege title in the plaintiff, and that title is in the plaintiff as the owner of the patent. Now, if the Court desires any authority on that I have authorities on that proposition.

The Court: I will hear from counsel.

Mr. Townsend: In the first place, this suit is brought in the name of Pevely Company. The name of Neher-Whitehead has never entered into this case in any way, shape or form. They have, however, written letters on the outside, and are spoken of as in the name of the patentee, and as patent

(Testimony of Leroy Pasteur Neher.)

owners, and so forth. Never until yesterday here in Court has it been said in this Court, or in a pleading, and I am ready to stand corrected if I happen to be in error, that there was a licensee, and we were not called upon to guess whether there were any licensees. It was the duty of the owner of the shell of these patents, the naked legal title, to join an exclusive licensee. I don't think you want to take the time, as long as this case has progressed [202] as far as it has now, to receive argument or hear authorities, but I intend at the end of their closing case to make a motion and leave the whole matter open to bring in on briefs. The rule is that an exclusive licensee is in every sense necessary and he is an indispensable party, and you cannot bring a suit and maintain it by a mere naked title without the real interest in the patent also being before the court. I am prepared to argue that, but I don't think we should do so at the present time. I do want to see that license, and the Court is entitled to see that license, and why don't they bring it in? If you want to state that the Neher-Whitehead Company, who is prosecuting this suit, manifestly, is the exclusive owner, is the exclusive licensee for the entire United States to make and sell, and the right to sell for use, and otherwise to carry with it the right to use in the licensee, perhaps we can satisfy the legal situation here, but as long as the license has been brought up I think we should see it, and

(Testimony of Leroy Pasteur Neher.)

the Court should see it. Why they should conceal it is more than I can understand.

Mr. Rogers: Your Honor, Mr. Townsend has known for a year and a half, on April 7, 1938 a letter was sent to the Borden Printing Company, "April 7, 1938: This is to advise you that certain display devices which fit around the neck of bottles, especially milk bottles, and which it is our understanding that you call 'Bottle-Kuf' constitute infringement of the Wasser patents," giving the names of the patents. "Our client, Neher-Whitehead Company, are exclusive licensees under these Wasser patents." And then that "This is a formal request that you cease such infringement," and so forth.

Now, Mr. Townsend just said he had no knowledge of this situation.

Mr. Townsend: I said I have no knowledge of anything appearing [203] in these pleadings since this suit was brought. I am ready to produce that letter and other letters in connection with it. That letter was written more than a year before this suit was brought.

Mr. Rogers: I beg your pardon. You are still off on your dates.

Mr. Townsend: April 7th, and the suit was brought in July, 1938.

Mr. Rogers: Well, this letter was April 7, 1938. I am sorry, you are still off on your dates.

Mr. Townsend: You said some other letters earlier than that.

(Testimony of Leroy Pasteur Neher.)

Mr. Rogers: This is the first letter that I have in this file, so far as I remember.

Mr. Townsend: There is a letter that was written months before the suit was brought, and when the suit was brought it was brought in the name of the Pevely Dairy Company, and not in the name, or even joining the name of the exclusive licensee, who was a necessary party.

Mr. Rogers: We concede the suit was not brought in the name of the Neher-Whitehead Company. We don't for a moment concede that Neher-Whitehead Company was a necessary party, but we do definitely state that the Borden Printing Company, as defendant, has certainly been on notice from the very beginning that Neher-Whitehead Company claims an exclusive license, and consequently if they wanted to invoke the matter, we think it has been inexcusable to wait for a year and a half to bring the matter up.

Mr. Townsend: We were under no obligation, whatsoever, by that letter to look for any title. We took the word of Mr. Kingsland in that letter. Now, suppose they brought—they say nothing, whatsoever, about Neher-Whitehead Company as a licensee. I am speaking about the papers in this suit, here, and there was [204] nothing in the form that would call on us to go into the question or to inquire beyond what was shown in the papers, themselves, and if they did not choose to notify us of Neher-Whitehead the burden is on them, and they take

(Testimony of Leroy Pasteur Neher.)

the consequences. Had they brought this thing up, if they had pleaded the license, we certainly would have seen it long before now, but I am saying now that yesterday was the first time the matter of a license has been mentioned in this suit, and we are entitled, and this Court is entitled, to see it.

Mr. Rogers: Your Honor, evidently the defendant's right hand does not know what its left hand is doing.

Mr. Townsend: The title is not before the Court.

Mr. Kingsland: We definitely stand upon the proposition that the owner of the patent may maintain the suit without a licensee being joined, and that is predicated upon Supreme Court authority in the case of *Birdsell v. Shaliol*, 112 U. S. 485, which definitely fixes that proposition. It is there said:

“A licensee of a patent cannot bring a suit in his own name at law or in equity for its infringement by a stranger.”

That is, the licensee.

“An action at law for the benefit of the licensee must be brought in the name of the patentee alone. A suit in equity may be brought by the patentee and the licensee together * * *. In a suit in equity brought by the patentee alone, if the defendant seasonably objected to the non-joinder of the licensee, the court might order him to be joined.

“But when a suit in equity has been brought and prosecuted in the name of the patentee alone, with

(Testimony of Leroy Pasteur Neher.)

the licensee's consent and concurrence, to final judgment, * * * we should hesitate to say that the licensee, merely because he was not a formal plaintiff [205] in that suit, could bring a new suit to recover damages against the same defendant for the same infringement."

In other words, they went to the extent there to say that where the licensee was not joined and the judgment in that case in favor of a patentee did not require any further proceedings by a licensee, and it is perfectly clear under the authorities that the legal holder of the title can sue in his own name. A licensee cannot sue without the patentee joining, but a patentee may sue in his own name, and also the licensee may be a party. Under the authorities, he is certainly not a necessary party. Therefore, we stand upon the proposition that this suit is properly brought by the owner of the patent.

We feel that so far as the license is concerned it is immaterial. The fact they are licensees has been brought out has no actual—we don't see that it has any bearing at all in the case, because if the patentee may maintain the suit in his own name it is immaterial whether the licensee is joined or not.

Mr. Townsend: We will be able to distinguish between that Shaliol Case, that he just read and show the facts there did not apply. I will present other authorities that will sustain the position that I shall take in this case. I am giving warning at

(Testimony of Leroy Pasteur Ncher.)

this time in regard to the situation that is before the Court right now. I have Supreme Court authorities and Circuit Courts of Appeals of another circuit here which conclusively establish my point, but I think it is premature and not going to save time. We are so near through the case I believe that your Honor would rather have the entire matter before you.

Mr. Rogers: May we inquire of your Honor whether he claims that he has never had sufficient notice of this document, or this license? [206]

The Court: No, that is not what it is. He is limiting himself to the pleadings, here, and the issues raised to indicate, as he said, as a legal proposition. That is all he says. He may or may not be correct, I don't know.

Mr. Rogers: Well, he is claiming now in regard to the production of the license, and the question is whether that will be produced. I am asking him whether he is claiming he has had no notice of any kind about a license sufficient to give——

Mr. Townsend: I have answered that, and the Judge has given you the right slant on it.

The Court: He wants to protect his record, and if there is any argument about it, in the interest of time, I don't want to cut anybody short here, I want to serve both of you, and I will take a recess and in your spare moments you might exercise your best judgment about this matter in an effort to dispose of it, and then I will dispose of it when I come back. Do I make myself clear, gentlemen?

(Testimony of Leroy Pasteur Neher.)

Mr. Rogers: That is clear, your Honor.

The Court: We will take a recess.

(After recess:)

The Court: Did you iron out your difficulties, gentlemen?

Mr. Kingsland: Well, we simply take the position that the suit is properly brought.

The Court: Very well, proceed. What is before the Court now?

Mr. Townsend: I take it that they refuse to produce the license.

Mr. Kingsland: Well, you ask for production of it?

Mr. Townsend: Would your Honor put the interrogatory to him whether he will or will not produce it? [207]

Mr. Kingsland: Well, we are perfectly willing to put the license in, but we still maintain that it is not material.

The Court: Well, probably if that was done—it could do you no harm, could it?

Mr. Kingsland: I don't think it could do any harm. I don't believe we could produce it physically right here at this time. We probably have copies in our papers if you will accept a copy.

Mr. Townsend: I am not foreclosing you from making any showing on the argument. I merely want the paper in evidence, here, before you conclude your case.

Mr. Kingsland: Of course, under the rules of the Court——

(Testimony of Leroy Pasteur Neher.)

The Court: I am not prepared to rule. I want to give both sides a record.

Mr. Kingsland: Our position is the licensee is not a necessary party.

The Court: I understand that.

Mr. Kingsland: Should the Court rule they are a necessary party, of course, under Rule 20 of the new rules the only thing would be to simply add them to the record as a party. Our position will stand just the same as the owner of a piece of real estate, who has the fee, regardless of whether there is a license the owner of the real estate has a right to bring ejectment as against a third party.

The Court: Proceed.

Mr. Townsend: We understand it will be produced?

Mr. Kingsland: We can probably give you a copy.

Mr. Townsend: If you furnish a copy and if you advise me it is true and correct I will take your word for it.

Mr. Kingsland: Well, we will search our papers at noon and produce it at that time. [208]

The Court: Proceed.

Mr. Townsend: Q. Your company, I assume, is paying the expenses of this litigation?

A. No.

Q. Neher-Whitehead Company is not paying?

A. Is not paying a cent of the expenses.

Q. What?

A. Neher-Whitehead is not paying a cent of the expenses.

(Testimony of Leroy Pasteur Neher.)

Q. It is being held out of royalties that you are paying under your license? A. No.

Q. Mr. Kingsland is the personal attorney of your company, is he not?

A. He is the attorney of the Pevely Dairy Company.

Q. He is also your attorney, is he not?

A. Well, if we get into litigation on patents he would be.

Q. He has attended to all the correspondence with this defendant, has he not? A. Yes.

Q. On your behalf?

A. I guess he has.

Q. And under your instructions?

A. Yes. No, not under our own instructions. We get in touch with the Pevely Dairy Company, they are the only ones who can authorize the attorney to do anything. We cannot.

Q. He has written letters, however, on your behalf, has he not? A. Yes.

Q. And to this defendant?

A. Yes, with the permission and authority of the Pevely Dairy Company.

Q. I suppose that is taken care of in the license, isn't it; that matter? A. Yes.

Q. That matter of litigation is taken care of in the license? A. Yes.

Q. So the license would be the best evidence. You say your attention was brought to this collar in the office of Pevely Dairy Company at what time?

(Testimony of Leroy Pasteur Neher.)

A. In the fall of 1928. [209]

Q. Fall of 1928. Have you a record to show that?

A. Yes.

Q. Or are you just speaking from memory?

A. No, we would have the record.

Q. And when was your first exploitation?

A. In about November, 1928, just as soon as we concluded our contract.

Q. What was the type of collar that you saw there in the Pevely Office?

A. Oh, it was the general shape that fits around a bottle.

Q. Can't you describe it with more particularity?

A. Well, I described it.

Q. Was it identical with the present collar that you are putting out, similar to Exhibit 25?

A. No, not exactly.

Q. Was more than one type of collar shown you at that time?

A. Yes, I think there were two or three.

Q. Can you describe, Mr. Neher, with any particularity the form of lock that appeared on the first of those collars that you saw in the Pevely office?

A. Yes. It was a slanting arrangement.

Q. Well, was there also a slot? A. Yes.

Q. What cooperated, if anything, with the slot?

A. Well, they had, as I recall it, that original collar which they had printed, a tongue and a sort of groove.

(Testimony of Leroy Pasteur Neher.)

Q. Could you describe the tongue any better?

A. I think I could show you a collar.

Q. Have you a collar that would correspond to the first one you saw?

A. I think I may have one there.

The Court: Look and see.

Mr. Townsend: Q. While you are at it, if you have samples of those first ones that you made when you went out on the road.

A. Well, I haven't those here.

Q. Have you some corresponding to them?

A. They were just [210] rough lay-outs. They were not samples, they were just rough lay-outs showing art work and so forth.

Q. Suppose you get such as you have of those early ones, if any.

A. Our original lay-out showed nothing except the collar. We don't put the tongue or anything else on them, the lay-out. In the patent here, 1,829,915, the Fig. 1 is the one which had printing that we saw.

Q. That was the first one that was employed, to your knowledge?

A. Yes. They had some other lay-out along with it, but that was the one that was printed.

Mr. Townsend: I have an enlarged chart drawing of these three patents, and for brevity here I think if there is no objection I will ask it be marked Exhibit A.

(The chart was marked "Defendant's Exhibit A.")

(Testimony of Leroy Pasteur Neher.)

Mr. Townsend: I am going to suggest, your Honor, that in referring to these patents, I have always found it very convenient if we refer to the first four numbers of a patent rather than a symbol of "A", "B" or "C". We will refer to the first patent here, No. 1,923,856, as the 1923 patent, and the second patent as 1829, and the third patent as 1999; mark them 1, 2, and 3, simply by reason of the priority of date of filing. The first application here was filed in January, 1929, but it was a patent that issued second, but it was the patent that was applied for first, so so far as these things are concerned the priority is based on the filing date, but they were all copending.

Q. Now, you have referred to the first sample that you saw there in 1928 as being that which is shown in Figs. 1, 2, and 3 of patent 1829 on this chart A? A. 1,829,915, yes.

Q. That is the one? A. Yes.

Q. Now, what was the first thing that you put out in 1929 when [211] you began the distribution of this shown in the drawing of any of these patents? A. Substantially this No. 4.

Q. Fig. 4 of 1829, that shows the fishtail or the tongue 12, does it not?

A. If you want to call it that; that is the collar.

Q. The Fig. 4 fishtail was the type you put out. That is similar to the one you are putting out today as shown in Exhibit 25?

A. Well, we have it on the bottle, there. That is one type we put out.

(Testimony of Leroy Pasteur Neher.)

Q. This? A. Yes.

Q. Now, did you put out any type, any of the types shown in the third patent, the 1999 patent?

A. Is that—are you referring to this one?

Q. Yes. I am referring to 1999. There are two sheets of drawings, you see.

A. Oh, I see. Well, this is what we are putting out.

Q. When you say “this”——

A. Well, you asked me——

The Court: Well, for the purpose of the record, the reporter has to put it in the record.

Mr. Townsend: Refer to the figure when you say “this”; Fig. 1 of 1999?

A. No, we haven’t put out this.

Q. Have you ever put out anything like appears on 1999? I don’t want to confuse you, Mr. Neher. A. No.

Q. But you understand that 1999 is where the ends are brought together and glued or double-seamed, or stapled. A. Yes.

Q. I don’t want to confuse you. Have you ever put out anything like that, of that type?

A. We have never put it out ourselves.

Q. I have something here which I will state was given to me as having come from your concern.

A. That’s right.

Q. From some of our customers.

A. We put those out.

(Testimony of Leroy Pasteur Neher.)

Q. You identify those two as handed you, and I will ask that those [212] be marked Defendant's Exhibits B and C.

Mr. Rogers: Well, the one with the animal on it, will that be indicated as "B", so I will know what to look for, and the one with "Dextrose" will be indicated as Exhibit C?

Mr. Townsend: Yes, that's all right.

(The devices were marked, respectively, Defendant's Exhibits B and C.)

Mr. Townsend: Q. When you say that among the six designs you had one which was featuring the return of the empty bottle, how was that collar made?

A. Oh, well, in the regular way, just giving you the statement of the——

Q. The printed matter?

A. Yes. It just said, "Please send back the bottle."

Q. It had nothing to do with interlocking means?

A. No.

Q. You do not claim that you make all of the bottle collars that are used in the United States?

A. No.

Q. Nor the majority of such collars?

A. Yes, I do.

Q. You think your company makes more than 50 per cent. of the bottle collars used in the United States? A. Yes.

(Testimony of Leroy Pasteur Neher.)

Q. In all the dairies. How many dairies are there in California that are available for the use of bottle collars?

A. I would say there would be about a thousand dairies. We have our own list of around 800, because we want to limit some of the small ones so the farmers—when I say a thousand dairies, there are a thousand or fifteen hundred people in the dairy business who could be classed as dairies, although a number of them would be a single man peddling milk, his own milk.

Q. You gave some figure of 858 as prospects.

A. That happens to be our list now.

Q. How many dairies did you say that you were serving at the [213] present time?

A. We are serving about 163.

Q. You do not serve the Golden State Company, do you? A. Yes, we do.

Q. You do now?

A. Yes. We sell them bottle collars.

Q. But you do not sell all they use, by any means, do you? A. No, sir.

Q. And you have not for some time, have you?

A. They haven't been using many for some time.

Q. But they haven't been using yours?

A. That is correct.

Q. They are also using the ordinary bottle hanger? A. Flat hanger, yes.

Q. To a considerable extent. Golden State—I think the Court will take judicial notice being a

(Testimony of Leroy Pasteur Neher.)

pretty big dairy, probably the biggest in the State, or one of the biggest.

A. They are one of the largest. They are a chain, you might say. They are not the largest in San Francisco.

Q. As a chain, as a group of dairies, they constitute a very large unit.

A. They are one of the largest units out here.

Q. And the Borden Company, the milk company, the Borden Milk Company, not the defendant printing company, but the Borden Milk Company is likewise one of the very large dairy outfits in this State, isn't it?

A. Yes, and the Borden Company is owned by Borden, the New York Company who have plants all over the East and the South, too.

Q. At least in this State the Borden Company does not use your collars?

A. That is not true; they do.

Q. They do use them? A. Yes.

Q. To some extent?

A. You bet they use them.

Q. They use other types of collars?

A. Other types of collars.

Q. Well, other types of—

A. Of flat hangers. [214]

Q. They use flat hangers?

A. Yes, they use them from time to time.

Q. They use them quite extensively, do they not?

A. I wouldn't know that.

(Testimony of Leroy Pasteur Neher.)

Q. When did you last sell Borden Company here in San Francisco any collars?

A. I guess it has been a year.

Q. A year, at least?

A. Yes. We have sold them down in Los Angeles.

Q. You said there were various types of hangers employed? A. Yes.

Q. You do not want the Court to believe the ones you have introduced here as Exhibits 27 and 27-A are the only types used?

A. No. There are hundreds of them.

Q. I show you some samples of what I understand to be hangers that are used to-day and used by the Golden State, I believe, if I am wrong you may correct me in any way.

Mr. Rogers: Mr. Neher can hardly testify that Golden State is using them, I have a doubt there, but if Mr. Townsend is testifying, himself, that Golden State uses them——

Mr. Townsend: No. I am asking him if he recognizes these hangers. I say I understand the Golden State——

A. I recognize them as flat hangers.

Q. In common use to-day? Will you examine them?

A. I recognize them at flat hangers. I don't know about the common use.

Q. Here is another type, do you recognize that, of the flat hangers? A. Yes.

Mr. Townsend: I ask that this be marked Defendant's Exhibit D for identification, and this

(Testimony of Leroy Pasteur Neher.)

other one as E for identification. I will take one of these, for example as F for identification, and [215] G for identification.

(The devices were marked, respectively, Defendant's Exhibits D, E, F, and G for identification.)

Q. Now, will you take that dummy bottle which I have here and which I am going to ask to be marked our Defendant's Exhibit H, and drop this hanger, Exhibit E for identification, over it, and show the Court how it is done, and then will you drop this Exhibit D for identification over the bottle, showing the other one? All of those lie comparatively legibly, do they not, so as to be legible?

A. Yes.

(The bottle was marked "Defendant's Exhibit H.")

Q. The first one that I showed you there was E, that is substantially flat when it is on the collar, is it not, the little one? A. That is what?

Q. That is substantially flat, the upright part is substantially against the neck of the bottle?

A. Well, it comes over and lays flat.

Q. Just as it appears. I suppose counsel will agree that they brought a suit against the Golden State Company?

Mr. Kingsland: Yes. There was a suit brought against the Golden State in this District, and that suit was dismissed without prejudice.

Mr. Townsend: Dismissed without prejudice.

Mr. Kingsland: That is correct.

(Testimony of Leroy Pasteur Neher.)

Mr. Townsend: And that was as long ago as December 24, 1934?

Mr. Kingsland: The Golden State agreed to discontinue and to purchase from Neher & Whitehead, that was the reason that suit was dismissed.

Mr. Townsend: Well, I did not ask for the voluntary statement. If you have a contract to support that I will ask for the contract.

Mr. Kingsland: I did not introduce the record in that case, [216] or invoke the judicial knowledge of the Court, because it was dismissed without prejudice.

Mr. Townsend: In December, December 27, 1934, as shown by the file wrapper.

Mr. Kingsland: I take it to be the date.

Mr. Townsend: The file wrapper on patent 1,829,915.

Mr. Kingsland: The only thing is I did not want the record to infer that it was dismissed without prejudice after a trial, or anything of that sort. It was dismissed because of settlement of the litigation.

Mr. Townsend: Dismissed without prejudice, that was the point. That is all.

Redirect Examination

Mr. Kingsland: Q. Counsel has called your attention to one or two forms of flat hanger; for example, the one that is marked Defendant's Exhibit E. In your experience in the industry will that satisfy the requirements the same as the collar that hangs? A. I should say not.

(Testimony of Leroy Pasteur Neher.)

Mr. Townsend: Object to that as calling for a conclusion of the witness. If he wants to show it doesn't lie down as well as——

Mr. Kingsland: Q. Wherein would that hanger, a hanger such as E fail?

A. Why, there isn't sufficient space to put the advertising message on it.

Q. How about maintaining it in the crate?

A. If you put ice on it it would, of course, tear this off, because any handling at all——

Q. In your experience in the industry would that be a suitable hanger to put on at the dairy?

A. No.

Q. How would it have to be applied?

A. It would have to be applied [217] by the driver.

Q. After the bottle was taken out of the crate?

A. Yes.

Q. You testified with respect to the license agreement from memory; you said you had the exclusive right. Does Pevely retain a right in that contract to make and use for themselves? A. Yes.

Q. In that sense it is not exclusive? A. Yes.

Mr. Townsend: That is calling for a legal conclusion.

Mr. Kingsland: You asked him for the conclusion. You asked him whether it was exclusive.

Mr. Townsend: Now, this witness—I want the contract, it is the best evidence.

Mr. Kingsland: The contract, under the understanding with the Court, will be produced and

(Testimony of Leroy Pasteur Neher.)

handed to you for whatever use you want to make of it.

The Court: Well, he wanted to develop on redirect examination that it was not exclusive, and they had the right to use it themselves. Is that so?

The Witness: Manufacture and use.

Mr. Kingsland: Of course, the wording of the contract, if your Honor admits the contract, is the best evidence, but I did not want it to go that it was in the sense that the witness spoke of as technically an exclusive license.

Recross Examination

Mr. Townsend: Q. Just two questions. The Pevely Company buys collars from you, do they not? A. Yes.

Q. One more question. You spoke about it being easier for you to [218] put on your collar represented by Exhibit 25—— A. Yes.

Q. Than it was to put on the hanger Exhibit E for identification. A. Yes.

Q. Will you take one in each hand and show the Court how you put them on?

A. Oh, this is not the practical way in the dairy.

Q. I am asking you to put those one, just show you put it on in each case.

(The witness demonstrates.)

Mr. Townsend: I see. That is all.

Mr. Kingsland: That is all, step down.

That, your Honor, is the Plaintiff's prima facie case.

Mr. Kingsland: I believe there was one exhibit, however, that I did not formally introduce, and that was the chart. I would like to have that simply for identification, and it is introduced as a chart.

The Court: Very well.

Mr. Kingsland: I would like that to take the following number, that will be 28.

Mr. Townsend: I want to enter an objection. This chart, your Honor, is offered here without any explanation. It has a lot of hearsay on here, it has a lot of lines running over it, put in by counsel, probably, and not one word of explanation. It is a misleading chart. It has matters on there that do not make or come from the patent, except in the word, the mere words. They have a drawing on there, and they have assumed the function of an expert to try to point out things from there that don't occur.

The Court: If there is any question about the foundation you can lay it.

Mr. Rogers: If the Court please, I can explain it easily. [219] This chart was made up as explained yesterday on the opening statement.

The Court: Well, if you have that in the record.

Mr. Kingsland: It is simply a chart coordinating the elements of the claim with the actual drawing of the device furnished by the defendant.

The Court: I will limit it to that and allow it.

Mr. Kingsland: That is all.

Mr. Townsend: You won't hold me to too strict account if I try to make it a little clearer. This lining that they draw here is what I object to. It is a lawyer's conclusion.

Mr. Rogers: That's right.

Mr. Townsend: If they are going to introduce anything that is going to be in the form of testimony they must——

The Court: It is not offered as testimony.

Mr. Townsend: It would be, your Honor. This would come up on a brief, something which has no place in the record, which is a chart that ought never to be offered as an exhibit, but would properly come in on a brief or an argument which would be here the patents in suit and the claims specified, and they are the defendant's exhibits, but to have it come in here as an exhibit, this thing, here, is to try to correlate those two things; it has no place whatsoever.

The Court: I will sustain the objection. Proceed.

Mr. Rogers: Is the objection sustained?

The Court: Yes.

Mr. Rogers: Then I suppose if it is—of course, we note an exception.

The Court: You have the record.

Mr. Rogers: Yes. It is in there for argumentative purposes to explain it. [220]

The Court: You have a record. Mark it for identification. I will limit it to that.

Mr. Rogers: Well, as long as it is in the record, or can be identified in the record——

The Court: Yes.

Mr. Townsend: Used for argument in the briefs.

(The chart was marked "Plaintiff's Exhibit 28 for identification.")

OPENING STATEMENT ON BEHALF OF
DEFENDANT. [221]

Mr. Townsend: On this Chart Defendant's Exhibit I, I will just state that I have numbered the various labels that we have produced, either on the bill of particulars or these last two voluntarily; labels No. 1, No. 2, and No. 3 are claimed by the plaintiff to come under claims 4, 7, 8 and 11 of patent 1829. No. 4 is claimed to come under patent 1923. No. 5 and 6 are mentioned to infringe claim 3 of 1999. Claim 3 is the interlocking claim, and patent 1999 is the one that has not been used, so you have a paper patent there to begin with.

Then we have here No. 7, which is claimed to infringe Claim 4 of patent 1829. We will show that is not infringed. Now, 8 and 9 were also two collars which we produced on the Bill of Particulars in August of 1939, and 8 and 9 are admittedly not infringed. [225]

Mr. Townsend: Now, these samples 10 and 11, I think we are entitled to a declaration from the plaintiff on whether they are going to contend they are infringed or not, and I am going to ask Mr. Kingsland to state now to the Court——

Mr. Kingsland: Of course, we ask counsel——

Mr. Townsend (Interrupting): I am asking you that.

Mr. Kingsland: We had inquired on three occasions, on two occasions, for all of the samples of collars that they made, and within the last day these collars were presented to us. As I understand it,

they have only been used a very short time, and for the purpose of this case we are waiving any claim as against those two, because we have our chart made up and it is for a different type of bottle, and whatever right there might be is waived for this case.

The Court: He wants me to approve or disapprove of them, so there won't be any question about it in any future case.

Mr. Townsend: We don't want another case on these things.

Mr. Kingsland: There will be no—there is no case on them yet.

Mr. Townsend: Well, these things vary in size, shape and form from time to time, as the witness on the stand, Mr. Neher, said; he makes them every day in various forms. We are entitled to an adjudication. The Court is entitled to a further declaration from the plaintiff whether or not those—

[226]

Mr. Kingsland: Well, they are for a different purpose.

Mr. Townsend: They are not for a different purpose. Pardon me. They are a bottle collar.

Mr. Kingsland: Had counsel submitted these as he was requested to do under the Bill of Particulars within time we may have examined them and come to some conclusion, but so far as they go now there is a waiver as to those two.

Mr. Rogers: There was a specific item in the Bill of Particulars as of last August to supply every-

thing they produced and after that they came up here with an additional bill of particulars, which, of course, is in itself, I think, open to sharp criticism. I came out here to litigate certain features, and certain other things are set up in the Answer concerning which we will have something to comment about later, and Mr. Townsend gives me these, gives these things to me last Thursday, when I am busy in this other investigation, and says, "Here are others, we insist on getting an adjudication on these," I insist they are not in the suit. He is trying to tell me I have to serve another bill of complaint, which I am not prepared to do. I think the whole procedure is clearly——

Mr. Townsend: These were brought to our attention and we complied with all the bill of particulars on the type of things that we had at the time, and Mr. Hursh just informs me that in the Bill of Particulars was a different type of lock that we used.

Mr. Rogers: I beg your pardon. I should like to read an item in the Bill of Particulars, because that statement is simply untrue. I mean you are mistaken. I beg your pardon if I seem to be personal. This is the item which should be straightened out, Plaintiff's Motion for Second Bill of Particulars, stating as follows: [227]

"1. Supply a copy of every bottle collar made, used, or sold by defendant referred to, not already in this case; and state in connection with each bottle collar made, used or sold by defendant the date when first made, sold, used, or offered for sale by defendant."

That says all bottle collars.

Mr. Townsend: I was speaking from——

The Court: He was misled by his able assistant.

Mr. Townsend: Well, the point is we supplied all that we had.

Mr. Kingsland: May I ask this, this argument is futile, because we cannot bring those in to-day without filing a supplemental bill of complaint, and we do not want to delay this litigation. I say so far as this litigation is concerned we waive as to those. It is only a question of a small number, anyway.

Mr. Townsend: We have insisted on a supplemental bill——

Mr. Kingsland: So far as we are concerned, the Court will not need to consider them.

Mr. Townsend: No. 2 was brought in after you spoke of it. I might remind counsel that I don't know anything about this Cleveland situation, how it was conducted, or anything, but I notice in their Bill of Particulars, I mean in their Findings there was an exhibit that was brought in at the trial, this Exhibit so-and-so be and it was held not to infringe, or to infringe, I forget which. That appeared in that case right during the trial. What brought it in I don't know. I am not insisting on anything further, I just want to get a fair statement, but we are going to take the point and interpret their waiver that they don't infringe, and we are going to argue accordingly.

Mr. Rogers: I do not agree with Mr. Townsend on that.

The Court: We will take an adjournment until two o'clock.

(A recess was here taken until two o'clock p. m.)

[228]

Afternoon Session.

The Court: Well, have you, gentlemen, disposed of your matter?

Mr. Kingsland: I have handed to Mr. Townsend a copy of the contract. What use he desires to make of it I don't know.

The Court: Well, in relation to these two examples that you have here that were injected into this case, what did you do?

Mr. Kingsland: Well, as to that there was no further conference about it except we took the position that they were never included in a Bill of Particulars, and technically the only way they can be brought in would be by a Supplemental Bill, because there is no pleading covering them, and for the purpose of this suit, as I stated to your Honor, we shall not make any claim as against them.

The Court: If you don't make any claim I will have to limit you to the pleadings in this case.

Mr. Townsend: Yes.

The Court: If the Bill of Particulars does not cover them.

Mr. Townsend: I am going to ask that these be marked as an exhibit in the case, No. 10 on Chart I as Exhibit J, and No. 11 will be Exhibit K.

(The devices were marked, respectively, Defendants' Exhibits J and K.)

As regards the contract, during the noon hour I have been supplied with such contract by counsel for plaintiff, a paper which purports to be an original contract between Pevely Dairy Company and Neher-Whitehead Company, which I assume to be the company we are talking about here. This contract is dated the 1st day of June, 1935. I want to call attention to the fact that this license agreement appears to be not the one that we were interested in. [229]

Mr. Kingsland: Now, Mr. Townsend, you are mistaken about that. There was an original license agreement, and it was revised, and rewritten at this date, and the statement is that from the first agreement the Neher-Whitehead Company was a licensee of the Pevely Dairy Company.

The Court: Do you know that to be a fact, Counsel?

Mr. Kingsland: I know that to be a fact.

The Court: Well, I take it you will accept counsel's statement.

Mr. Townsend: Now, could you give us the date of the original contract?

Mr. Kingsland: Why, it was sometime——

The Court: What year?

Mr. Kingsland: I think about 1929.

Mr. Neher: I think it must have been 1928.

Mr. Kingsland: 1928 or 1929. This contract was an existing contract at the date of the suit. I object

to any use of this contract in the suit, because I do not offer this within the pleadings, at all. We have alleged ownership of the patent and have proved ownership of the patent as the patentee.

The Court: Now, he is attempting to disprove that by your contract. You don't want to preclude him from doing that, do you?

Mr. Kingsland: I didn't see that the license agreement has anything to do with it.

The Court: I don't know. He has taken the position that it does.

Mr. Townsend: It has a very definite position in this case, and I want to read some of it if for no other reason than admissions against interest.

The Court: I will give you a record on it. [230]

Mr. Kingsland: The only point is this, if the contract is to be used at all it should be used entirely. I mean a few excerpts from it mean nothing.

The Court: No.

Mr. Townsend: Well, I will offer this in evidence. If you wish to withdraw it and furnish a photostatic copy it is all right with me.

Mr. Kingsland: As a practical proposition I would like to have it photostated, because it is the original contract.

Mr. Townsend: Well, we will offer the original with the understanding that a photostatic copy may be substituted.

Mr. Kingsland: That offer is made over my objection that it is not material to the issues here.

The Court: Very well. For the purpose of the record, indicate the purpose of the offer.

Mr. Townsend: The purpose of the offer is to show the relationship between Neher-Whitehead Company and the plaintiff, that the Neher-Whitehead Company is the exclusive licensee, and we will contend is a necessary party; secondly, there are some statements in here which I want to refer to which will be in the nature of admissions against interest, and I may at this time just refer briefly to one or two apparently in that regard which would bear on the point I am making. That is my position.

Mr. Kingsland: It seems a singular theory that a legal document can contain an admission against interest.

The Court: I don't know what counsel has in mind. I will give him a record over your objection and subject to your motion to strike.

Mr. Townsend: This is Exhibit——

The Clerk: Exhibit L.

(The document was marked "Defendant's Exhibit L.") [231]

Mr. Townsend: A license agreement of June 1, 1935 between the Pevely Dairy Company, called the Dairy Company, and Neher-Whitehead Company, called the Company, Exhibit L. Just an excerpt from that:

"Whereas, the Dairy Company holds by assignment the entire right, title and interest in and to a certain invention and patent, U. S. Patent Nos. 1,829,915, 1,923,856, and 1,999,011, allowed to Joseph J. Wasser on an advertising device known as the 'Milk Bottle Lamp Shade.' "

Those are the three patents in suit. Then it goes on to say that these patents, "cover the exclusive rights to the creation, production, sale and use of bottle collars, neckers, or jackets conforming to the general shape of the neck of a bottle when sealed together, so as to fit snugly about it, covers every practical shape and design, made of paper, board stock, or the like, produced flat for sealing together by any adhesive, by tucking, slotting, stapling, stitching, sewing, etc."

It refers throughout the contract to these articles as "Milk Bottle Lamp Shade." It also specifies the amount of royalty to be paid, and so forth, which we are not concerned with at this present time.

Mr. Kingsland: While we are speaking on that, I would like the Court to note in connection with this contract that it is not technically an exclusive license, that the Pevely Dairy Company retained the right to have manufactured for itself and to distribute within an area, so it is not exclusive.

Mr. Townsend: Now, your Honor, as a formal matter, and as the close of the plaintiff's case, I want to refer to Rule 41 as to dismissal of the action, any voluntary dismissal and involuntary dismissal. Rule 41-B of Civil Procedure provides that "When the plaintiff has completed the presentation of his evidence [232] the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

I will move you, your Honor, that the Bill be dismissed for failure to join the exclusive licensee as a necessary party. I submit it pro forma.

The Court: For the purpose of the record the motion will be denied at this time.

Mr. Townsend: Yes, for the purpose of the record. I have prepared here a brief analysis breaking down the claims of the patent in suit. I will hand counsel a copy and with your permission I will hand the Court a copy, Analyzing Claim 1 of the first patent, 1923, Claims 4, 7, 8 and 11 of the second patent, 1829, and Claim 3 of the third patent, 1999.

There is also interleaved a page with respect to each different patent and the date showing the references that were cited during the pendency of the several patents, many best references being omitted. I believe it will be helpful to your Honor.

Mr. Rogers: Are you marking that for identification?

Mr. Townsend: No, just a memorandum for the Judge.

Mr. Rogers: Do you know whether it differs from our analysis of the claims?

Mr. Townsend: I believe it was copied from yours and then checked. I found only one typographical error that was made, I think, in regard to Claim 3.

Mr. Rogers: May I ask whether that typographical error, if it was an error in the printing, because mine were cut out of the patent.

Mr. Townsend: I mean when I say "analysis,"

you have given [233] an analysis in your Bill of Particulars at one time and I told my Secretary to follow that form, but to check from the patents, so it is presumably a verbatim account of the patent, and the error, of course, was to be corrected.

Now, I offer as Defendant's Exhibit M a certified copy of Canadian patent 293,378, September 24, 1929, application filed January 24, 1929. This Canadian patent bears a very definite legal relation with respect to these American patents, and the drawings of the Canadian patent correspond to certain drawings which we will point out later; correspond to drawings Figs. 1, 2, and 3 of patent 1829, which was filed December 18, 1930. This application was filed more than one year, the foreign application filed more than one year before the American application here was filed. It is a matter purely of argument as to its legal effect. I offer this as Defendant's Exhibit M.

(The document was marked "Defendant's Exhibit M.")

Mr. Townsend: Next I offer certified copy of a forfeited and abandoned application of Joseph J. Wasser filed September 19, 1928, Serial No. 306,887, and filed and abandoned. It became abandoned February 19, 1931. It was allowed because of certain limited claims, allowed August, 1930.

Mr. Rogers: You say it became forfeited only, or abandoned?

Mr. Townsend: Well, it became abandoned February 19, 1931.

Mr. Rogers: Of course, that is wrong, Counsel.

Mr. Townsend: Well, I offer that as Exhibit N.

Mr. Rogers: Well, there is quite a difference between forfeiting and abandoning.

(The document was marked "Defendant's Exhibit N.") [234]

Mr. Townsend: I will offer the following documents in evidence showing the state of the art, and, of course, an anticipation, as the case will show. If I offer any patents that have not been noticed in the Answer then they will be received as for the purpose of showing the state of the art, but any which have been noticed go in for all purposes bearing on invalidity.

Patent to Gridley, 63,629, April 9, 1867, as Exhibit R-1.

By the way, I will first offer the entire book as Exhibit R, and these different patents as Exhibits R-1 and so on. The patent to Gridley, 63,629, is R-1.

(The book of patents was marked "Defendant's Exhibit R"; the patent last above referred to was marked "Defendant's Exhibit R-1.")

Patent R-2 will be the patent to Swope, No. 228,002, May 25, 1880. That will be R-2.

(The patent was marked "Defendant's Exhibit R-2.")

Mr. Rogers: You are skipping about four out of every five set up in the answer.

Mr. Townsend: No. They are all there, I believe, except some I will go to later.

Exhibit R-3, patent to Klein, No. 704,549, July 15, 1902.

(The patent was marked "Defendant's Exhibit R-3.")

Mr. Rogers: I don't have that.

Mr. Townsend: If that is not noticed in the answer that is for the purpose of showing——

The Court: Those that are not noticed he is showing for the purpose of showing the state of the art.

[237]

Mr. Townsend: Yes.

Mr. Rogers: That seems to be the practice. They can't be used for anticipation, of course. Mr. Townsend, would you be so good as to state the title of those patents, please?

Mr. Townsend: Yes. The first patent, Gridley, R-1, is a Fruit Basket. The second, R-2, was a Bottle Wrapper. Klein, Exhibit R-3, is a Fruit Box.

Defendant's Exhibit R-4, patent to Cheney, 716,668, December 23, 1902. That is a Waterproof Holder for Flower Pots.

(The patent was marked "Defendant's Exhibit R-4.")

Exhibit R-5, patent to Guardino, 1,300,164, April 8, 1919, for a Container.

(The patent was marked "Defendant's Exhibit R-5.")

R-6, is a patent to Spellman, 1,309,263, July 8, 1919, Lamp Shade. Bear that in mind in connection with this license.

(The patent was marked "Defendant's Exhibit R-6.")

The Court: What significance is there whether it is a horse collar or a lamp shade?

Mr. Townsend: None at all if it has the same structure.

The Court: That is it exactly.

Mr. Townsend: Exhibit R-7, patent to Knapp, 101,135. March 22, 1870, for a Tree Protector.

(The patent was marked "Defendant's Exhibit R-7.") [238]

R-8, patent to Taylor, No. 343,866, June 15, 1886, for a Paper Box.

(The patent was marked "Defendant's Exhibit R-8.")

Mr. Townsend: As R-9, patent to Colby, 964,395, July 12, 1910, Sleeve Protector.

(The patent was marked "Defendant's Exhibit R-9.")

Exhibit R-10, patent to Schack, No. 1,163,110, December 7, 1915, Display Form.

(The patent was marked "Defendant's Exhibit R-10.")

Spellman would apply again to a Display.

R-11, patent to Goes, No. 1,480,681, of January 15, 1924, Display Stand. I call attention particularly to Fig. 2.

(The patent was marked "Defendant's Exhibit R-11.")

Exhibit R-12 is a Swiss patent, 110,722, of the 9th of October, 1924, published July 1, 1925, and

received in the Library of the U. S. Patent Office September 9, 1925.

Mr. Rogers: Are you offering the translation?

Mr. Townsend: Yes. That is for a Drop Catcher of Bottles.

Mr. Rogers: Your Honor, we will consider the translation subject to correction.

Mr. Townsend: Yes. The translation would be R-12-1.

(The patent was marked "Defendant's Exhibit R-12," and the translation "Defendant's Exhibit R-12-1.")

Now, the next is R-13, a design patent to Seely, 16,779, [239] July 6, 1886, for a label.

(The patent was marked "Defendant's Exhibit R-13.")

R-14, patent to Hoard and Miles, No. 47,822, May 23, 1865, a Fluke Basket.

(The patent was marked "Defendant's Exhibit R-14.")

Exhibit R-15, patent to Knowlton, 53,836, April 10, 1866, Tree Protector.

(The patent was marked "Defendant's Exhibit R-15.")

Exhibit R-16, copy of British patent 13,360, of July 1, 1901, Improvement in Label for Poisons and other Bottles. I call your attention particularly to Fig. 3.

(The patent was marked "Defendant's Exhibit R-16.")

In that connection we would refer again to the Cheney patent, 716,668, which is already in under another number.

R-17, patent to Tomlin, 1,158,871, November 2, 1915, Megaphone. Note it has an interlocking tab 8 and slots 9 in Fig. 5.

(The patent was marked "Defendant's Exhibit R-17.")

R-18, patent to Nuhn and Another, patent 281,391, July 17, 1883, Elastic Label.

(The patent was marked "Defendant's Exhibit R-18.")

Exhibit R-19, patent to Heard, 1,353,531, September 21, 1920, Marking Card for Milk Bottle.

(The patent was marked "Defendant's Exhibit R-19.")

R-20, patent to Piatt, No. 1,473,313, of November 6, 1923, Display Device Shown Applied to a Milk Bottle.

(The patent was marked "Defendant's Exhibit R-20.")

R-21, patent to Faulhaber, 1,683,176, September 4, 1928; application filed January 25, 1927, a Catch Drop for Bottles.

(The patent was marked "Defendant's Exhibit R-21.") [240]

R-22, patent to Shaw, 1,837,495, of December 22, 1931, Application filed February 26, 1930, Milk Bottle Collar.

(The patent was marked "Defendant's Exhibit R-22.")

Mr. Rogers: That is subsequent to our patent.

Mr. Townsend: Well, subsequent to your first.

The Court: That looks like as though it fits on a bottle like a glove, too, doesn't it?

Mr. Townsend: Yes.

Mr. Rogers: I think he probably copied us.

Mr. Townsend: Now, the following patents, I think I will have to furnish counsel with copies and next offer to show the state of the art of paper interlocks.

Exhibit R-23, patent to Raynard, 871,767, November 19, 1907, Folding Paper Box.

(The patent was marked "Defendant's Exhibit R-23.")

Mr. Rogers: I will ask you whether I might not understand that from the last, 23-R, on, for the present, are not set up in the Answer?

Mr. Townsend: I think all but this last Wood patent, which I put in for another purpose, I think these all come under the state of the art.

R-24, to Hirsch, No. 756,019, March 29, 1904, Folding Box.

(The patent was marked "Defendant's Exhibit R-24.")

R-25, patent to Palmer, 1,174,605, March 7, 1916, Box or Carton.

(The patent was marked "Defendant's Exhibit R-25.")

R-26, Patent to Williams, 1,713,154, May 4, 1929.

(The patent was marked "Defendant's Exhibit R-26.")

R-27, patent to Wood, No. 1,793,348, February 17, 1931, application filed August 23, 1930. That has nothing in connection [241] with regard to the state of the art, but with regard to explaining certain actions in the Patent Office, where the Wood patent was referred to and cited, and the question of laches in the belated presentation of claims after the Wood patent became known to the plaintiff.

Mr. Rogers: Of course, the Wood patent is the patent of Rusling Wood, who was sued by the plaintiff, and that finally took a consent decree.

The Court: He adjusted that out of court. [242]

HARRY S. BORDEN,

called for the defendant; sworn.

Mr. Townsend: Q. Mr. Borden, will you please state your name, your age, residence, and occupation?

A. My name is Harry S. Borden; I am aged 51; my occupation is President of the Borden Printing Company.

Q. You are the defendant in this case?

A. Yes.

Q. How long have you been connected with that company?

A. Since its inception in December, 1921.

Q. What has been the business of the Borden Printing Company?

A. Printing of every description.

Q. Prior to that what had you been doing?

(Testimony of Harry S. Borden.)

A. Before starting in business for ourselves I was the manager of the Commercial Printing & Supply Company, and also one of its stockholders for a period of about five years.

Q. When you first started in the work what was your line of work?

A. I first went to work for the Mutual Label Lithograph Company in 1900.

Q. Here in this city? A. Yes.

Q. What was the nature of the work you did there?

A. I was in the press-room, started in the press-room, and worked in the box factory, and in the manufacture of folding cartons and folding boxes.

Q. How were those paper boxes united together?

A. They were united together pasted on one side of a carton. they were pasted on one side and then by a series of flaps and slots that we call "fishtail", hooks, they would be hooked together. They were delivered flat, but they would be die-cut that way so they could be hooked together by the customer prior to filling them; also in the manufacture of folding boxes for clothing stores, we would [243] manufacture them and there wouldn't be any gluing on those at all, just merely die-cut with slots, and these fishtail hooks that have been used, they were in vogue at that time. I don't know how long before that, but they had been in use ever since with variations one way or another, but accomplishing the same purpose.

(Testimony of Harry S. Borden.)

Q. Can you, by reference to any of the drawings appearing here on the chart, Exhibit A, showing the three patents in suit, illustrate what you mean by the fishtail lock?

A. A fishtail lock would be the elongated end that projected and was inserted into the slot in each case, same here.

Q. How about this one here, in Fig. 4 of patent 1829? A. That is typical of them.

Q. Would you call this a fishtail, here, the first patent, 1923?

A. We not necessarily would call that a fishtail. It has a sort of oblong slot or piece that would project in. That is now being used in the manufacture of display material wherein it goes to a store in a knocked-down condition and then the store puts them together and puts merchandise of different types in them. This is a very similar hook, or, as we term them, hooks, and assemble these pieces, you put them together. They go through slots and are joined there.

Mr. Rogers: If the Court please, I am sorry to say it, but I don't find Mr. Borden is set up as having prior knowledge or prior use. Not that in this it makes any particular difference but——

Mr. Townsend: I thought he very clearly set out his qualifications here.

Mr. Rogers: Well, you didn't set him up in the Answer as having any prior knowledge.

Mr. Townsend: This is showing the state of the art only as to interlocking paper—— [244]

(Testimony of Harry S. Borden.)

Mr. Rogers: Oh, you are just showing the state of the art?

Mr. Townsend: Well, that is all I can with the paper boxes.

Mr. Rogers: Well, his testimony is not for anticipation?

Mr. Townsend: It bears on the subject of the art.

Mr. Rogers: Well, that is a legal conclusion, but the legal conclusion as to the question of their infringement.

Mr. Townsend: Well, the witness' testimony is to show the state of the art. This is developing his practical knowledge of interlocking devices.

Q. In any of your early work there was the Schmidt Company—by the way, the Schmidt Company—

A. The Mutual Lithograph was a combination of three concerns which finally devolved into the Schmidt Lithograph Company as it exists to-day.

Q. The Mutual and the Schmidt Company, when you were with them, did you ever unite box sections, or paper sections in the manner shown here in this patent 1999, the third patent?

A. We glued them together. As I said before, a good many of the cartons would be glued, and the folded piece would have the lock on it, the carton being glued down, and the combination of gluing and having the locks on them also, because they were delivered flat, and when they are brought out

(Testimony of Harry S. Borden.)

into shape so they can be filled then they have to be locked together underneath and on top.

Q. We have a chart here, Exhibit I, showing some eleven different labels or collars. I will ask you if you can identify those. A. Yes.

Q. What do you know about them?

A. We manufactured them.

Q. Each and all of those have been made prior to the beginning of this trial, here, by your company? A. Yes.

Q. And have you used these or similar collars for any other purpose than milk bottles?

A. Yes. [245]

Q. Tell us about that.

A. Well, one example that was probably outstanding that we used was during the last Market Week in San Francisco, that went around the electroliers along Market Street, in what we call the Triangle District, an invitation to those people who were coming in for the purpose of participating in Market Week, and we used the same device and the same lock, really an enlargement of what you see there.

Q. When it united did it form a cylinder or cone? A. It formed a cylinder.

Q. Do you identify this piece of cardboard I am showing you? A. Yes, that is it.

Q. Tell us about what it is.

A. This went around the electrolier on Market Street in the Triangle District, and they were locked

(Testimony of Harry S. Borden.)

together and folded back; the same identical thing that is shown on that board, there.

Mr. Townsend: Do you care to make any statement or charge or allegation with regard to this?

Mr. Kingsland: No. Mr. Townsend, I think we have clearly——

The Court: It has nothing to do with a milk bottle.

Mr. Townsend: Yes, but you might have a big one. I offer this label identified by the witness, we will call it the electrolier collar, as Defendant's Exhibit S.

Mr. Kingsland: It is objected to as wholly immaterial, an issue which is not pleaded, and has no apparent application at all to the patents in suit, and it is an incumbrance of the record.

The Court: What is the purpose of this offer?

Mr. Townsend: The purpose is to show some of the manifold positions that these articles can take, and bearing out in the same way, corroborating to some extent Mr. Neher's testimony that there are all sorts of multiple things, covering all sorts [246] of shapes, and so forth. For example, unquestionably the patent that they are relying on——

Mr. Rogers: Do you pretend this was made before the date of the patent in suit?

Mr. Townsend: No. It is offered as a product of the defendant, and we want to know whether it will be charged to be infringing.

Mr. Kingsland: No, sir. We can only prove——

(Testimony of Harry S. Borden.)

Mr. Townsend: Very well. I offer this as Exhibit S.

Mr. Rogers: We object to it.

The Court: Well, I think you answered your own objection. Someone said there are one hundred different types of all kinds and character. I think that was your own testimony.

Mr. Kingsland: Your Honor, I think the witness said, and we will refer back in the record to find it if necessary, I think what was being referred to was the different advertising messages and things of that sort.

The Court: Maybe this is one of them; I don't know.

Mr. Kingsland: I don't see any——

The Court: I don't know, to be frank with you. It is most speculative.

Mr. Townsend: It goes to show the discrimination that the plaintiffs, themselves, set up here in regard to these patents. If one thing can infringe and another thing does not infringe there certainly must be some line of demarcation, and we want to know what that is, ourselves.

The Court: I will let it in.

(The label was marked "Defendant's Exhibit S.")

Mr. Townsend: Now, in regard to Exhibit K, which is No. 10 on Exhibit I, will you tell us how that collar has been used [247] by you?

(Testimony of Harry S. Borden.)

Mr. Kingsland: If your Honor please, I object to any evidence in relation to it since it is out of this case.

The Court: 10 and 11 are out.

Mr. Townsend: May I not make my showing?

The Court: Well, I tried to limit the testimony. I limited your Bill of Particulars to the record in this case. I so indicated.

Mr. Townsend: I don't know whether you understand me, or not.

The Court: I tried to. That was my thought, in any event. If I failed to do it I will call it to your attention now. I will limit you to the pleadings in this case. Unless there is something in here covering 10 and 11 they will be out.

Mr. Townsend: I will couple it up, your Honor. In short, I will couple this up with the prior art and I will show that these things that we are making to-day are bottle collars, and the reason that they are trying to keep them out of the issue is because they are made according to some of the patents that have been shown to you, and I would like to just merely connect up their use by this gentleman, and then I will prove, I have proof for my statement, I can only do one thing at a time. I would like to have that identified as used by him. May I do that, subject to my connecting it up?

The Court: It is hard for me to resist you.

Mr. Rogers: It was the same as the prior art. That is just duplication, the same as the prior art.

(Testimony of Harry S. Borden.)

Furthermore, there is no evidence, that I know of, that can connect it up with the patent in suit.

Mr. Townsend: "That which infringes it later anticipates it earlier" is an axiom which is just as glib on our tongues as ABC.

Mr. Rogers: Are these specifically set up as prior art? [248]

Mr. Townsend: The patents are set up.

Mr. Rogers: Are these collars set up?

Mr. Townsend: These collars are made recently, themselves, but the patents——

Mr. Rogers: Well, the patents are all you need.

Mr. Townsend: I would like to show these are bottle collars actually used by this witness, and then I will show later, I can't do it by him, because he is not a patent expert, that they do connect up with the prior art, and if I cannot make that connection, your Honor, I will concede that what I am doing now will be stricken, but I ask that privilege of making that connection. It will take me a very short time to have him identify these as bottle collars.

The Court: I will allow it subject to a motion to strike and over your objection. Proceed.

Mr. Townsend: Q. The question is in regard to Exhibits K and L, the Exhibits J and K on Exhibit I, whether such collars have been made by you and have been used.

A. You are now referring, Mr. Townsend, to the two that I just discussed here?

Q. Yes.

(Testimony of Harry S. Borden.)

A. I cannot see those numbers down there on the board; that is the reason I asked that question.

Q. Exhibit K is No. 10 on the chart, and corresponds, I understand—pardon me if I am wrong—to the collar that is on this bottle that is marked “Sani-Clor Bleaching and Washing Fluid.”

A. Yes, it is. That is a bottle collar manufactured by us.

The Court: How long has that been manufactured by you?

A. We have been manufacturing for this firm for a little over a year.

Mr. Townsend: Are those sold and used, to your knowledge, on bottles of that sort?

A. Yes, on this and larger types.

Q. On a larger type. Well, you refer to a jug.

A. Yes, with a notch cut for the handle of the jug to slip around. [249]

Q. With regard to the collar which is shown as No. 11, Exhibit K on Chart I, have you a replica of that there?

A. Yes. We manufacture them for the purpose of advertising for one of the dairies here who had a problem. Their problem was they had these cartons and they wanted to advertise, the Bell-Brook Milk Company, it was, they wanted to advertise Bell-Brook milk to their customers on these cartons, and I believe they had purchased a lot of cartons, and we manufactured and designed this one collar for this particular carton.

(Testimony of Harry S. Borden.)

Q. This carton you are referring to is ordinarily called a paper bottle? A. Yes.

Q. This is such as you refer to? A. Yes.

Q. And used on collars with Bell-Brook milk?

A. Yes.

Q. Those were actually made on order and delivered? A. Yes.

Q. And used, to your knowledge? A. Yes.

Mr. Townsend: Now, your Honor, I am going to ask about this first collar, here, corresponding to Exhibit J, I will ask it be marked Exhibit J-1, and the bottle which it is applied to be called J-2, being a "Sani-Clor" bottle, and that the collar which corresponds to Exhibit K, No. 11 of Chart No. I, be marked K-1 and the paper bottle be marked K-2. I will correct that back there. I want those marked J-1 and J-2.

Mr. Kingsland: I understand, your Honor, our objection stands good on this whole line without repeating it?

The Court: Yes, it is coming in subject to your motion and over your objection.

(The articles referred to were marked, respectively, Defendant's Exhibit J-1, J-2, K-1 and K-2.)

Mr. Townsend: Q. Is there any difference in practice in making a cylinder collar or a conical collar? A. No differ- [250] ence, at all.

Q. Now, there was some talk heretofore about paper hangers, and we offered for identification as D, E, F, and G—do you know anything about those

(Testimony of Harry S. Borden.)

particular hangers, and by whom they are used, and if they are in use?

A. We manufacture this type of a hanger the same as a bottle collar, or any other device that the customer might desire or want.

Q. Are any of those in that group there of your manufacture?

A. Yes. This particular one, here, take the Borden Company.

Q. Exhibit D for identification. When was that made and delivered, approximately?

A. I think that was just prior to last Thanksgiving. We are designing one for them now for this Thanksgiving.

Q. Of a similar character? A. Yes.

Q. When you say you are designing, you mean you set up a design?

A. Well, they want some art work on it this time, and it is in my art room, in our art room, I should say, being designed by the artist.

Mr. Townsend: I offer it as Exhibit D.

(Exhibit D for identification was admitted in evidence and marked "Defendant's Exhibit D.")

The Witness: The others are typical of what is manufactured in the industry by any printing company anywhere. In fact, this is a competitive product, and we will manufacture it for a customer [251] this month and somebody else will do it for him at a cheaper price next month.

Mr. Townsend: Q. Do you know whether those are all in use to-day? A. Yes.

(Testimony of Harry S. Borden.)

Q. And have been over a considerable period of time? A. Yes.

Mr. Townsend: I will offer them as Defendant's E, F, and G, respectively.

The Court: Let them be marked.

(Defendant's Exhibits E, F, and G for identification were received in evidence and marked, respectively, Defendant's Exhibits E, F, and G.)

Mr. Townsend: At this point I want to introduce some correspondence, and I will ask either Mr. Kingsland or Mr. Rogers to take the stand to identify some signatures.

Mr. Kingsland: Oh, we concede the signatures.

The Court: You may get a stipulation.

Mr. Townsend: I was hoping I could do that.

Mr. Kingsland: Subject to the objection I told you I would have to that, but I don't see any materiality to the correspondence.

Mr. Townsend: I want to show the relationship of your company to these patents and the threats that were made, and the correspondence that took place between Borden and his attorneys and the Neher-Whitehead Company and its attorney.

Mr. Kingsland: Do you mean you are trying Neher-Whitehead and Pevely Dairy Company?

Mr. Townsend: In part, but I am going to show a course of conduct, the good faith on the part of this defendant in regard to this litigation. It may be if I make a statement, what I [252] have here, I have a letter here, the original letter from Mr.

(Testimony of Harry S. Borden.)

Lawrence C. Kingsland, St. Louis, dated April 7, 1938, registered mail, addressed to Borden Printing Company.

Mr. Rogers: Which we concede he wrote.

Mr. Townsend: Charging infringement by this defendant. The matter was referred to us promptly for consideration. On April 18th we replied, my firm replied to Mr. Kingsland that we were looking into the thing, and asking if he could tell us a little more in detail what claims it would apply to; and a letter of April 22, 1938 from Mr. Kingsland replying to us in regard to the Wasser patents, and attempting to apply certain claims. The next letter is one asking us if we would hurry up in making our report. On May 11th a reply I wrote, personally, to Mr. Kingsland, and analyzed the patents, and pointed out the incorrectness of his position. That goes to the question of bona fides of this defendant, and we pointed out, just as we are pointing out here, that it could not spell infringement, because those claims were not infringed. On the matter of notice, and this correspondence that was conducted on behalf of Neher-Whitehead Company and our replies show Mr. Borden's position, and it is certainly part of the *res gestae* of this suit, the beginning, the bringing of the suit, and I believe, I submit we are quite entitled. I never heard——

Mr. Rogers: Your Honor, my objection is it is simply incumbering the record.

(Testimony of Harry S. Borden.)

The Court: Read them into the record.

Mr. Townsend: I will offer this correspondence as Defendant's Exhibit T.

The Court: Put them all in as one exhibit.

Mr. Townsend: The whole thing is Exhibit T, including the [253] paper to which I have just referred, and I will not take the time to read from them at this time because they will be in the record and we can refer to them in the briefs.

Mr. Rogers: Will you give me the dates of those letters, Mr. Townsend?

The Clerk: April 7, 1938, that is Kingsland to Borden Printing Company; April 18, 1938, is not signed, a letter from Townsend & Hackley to Mr. Kingsland; April 22, 1938, is a letter from Kingsland to Townsend & Hackley; letter of May 4, 1938, a letter from Kingsland to Townsend & Hackley; letter of May 11, 1938 is a reply to Kingsland's letters of April 22nd and May 4, 1938.

Mr. Townsend: Which are written and signed by myself.

(The correspondence was marked "Defendant's Exhibit T.")

Mr. Townsend: Q. Did Neher-Whitehead ever threaten you or your customers with suit for patent infringement prior to bringing this suit?

A. Yes.

Q. Where and under what circumstances?

A. Mr. Neher threatened me in my own office.

Q. When?

(Testimony of Harry S. Borden.)

A. I believe it was in the latter part of 1937, the first part of 1938. It was after we had printed this one, the "Vote Yes on No. 3."

Q. You are referring to the label marked 3 on the chart Exhibit I?

A. Yes. Mr. Neher came to my office one day and presented me with his card, told me who he was and told me that we were infringing on his patent, and I told him that I was quite certain that we were not, because whatever we had done, or would do, would be on the advice of our attorneys, and I gave him your name at that time, the firm of Townsend & Hackley, and told him that before we had manufactured anything that a research had been made and that we produced nothing except under your advice, and it would be better [254] for him to go over and see you folks at that time. He told me then that if we did not stop he would stop us, the same as he stopped everybody else all over the country, and that about terminated the interview.

Q. Did he threaten your customers?

A. I don't know whether Mr. Neher, personally, has, but someone, I believe, representing that firm has communicated with a number of firms with whom we endeavored to do business, and as a result we were prevented from securing orders because of patent matters. In fact, we had to submit to them an agreement whereby we agreed to indemnify them against any loss that might ensue through any suit

(Testimony of Harry S. Borden.)

against them because of the use of the bottle collars manufactured by us.

Mr. Rogers: I object to this testimony, because he is not competent to testify as to whether anybody has threatened anybody except himself.

Mr. Townsend: Just to connect that up, have you an original letter purporting to have been sent by the Neher-Whitehead Company?

The Court: Before we get any further the objection will have to be sustained, and that testimony will go out.

Mr. Townsend: Unless we can connect it up, your Honor?

The Court: It was a general statement. Develop the facts, whatever they are.

Mr. Rogers: That is a letter of Neher-Whitehead Company apparently signed by Mr. Neher directed to someone whom I never heard of, and neither did Pevely Dairy Company, if so it would seem to not have any connection at all.

Mr. Townsend: May I ask Mr. Neher if he will identify the signature there?

Mr. Kingsland: We don't deny the authenticity of that letter.

The Court: Well, show it to the witness. [255]

Mr. Townsend: There is a letter you handed me. Is that addressed to one of your customers, or prospective customers?

A. Yes, one of our customers.

(Testimony of Harry S. Borden.)

Q. As a result of that letter, what did you have to do?

A. We had to furnish them with an agreement to indemnify them against any loss, or possible loss, that might occur through the use of our collars.

Mr. Townsend: I will offer the letter, your Honor.

Mr. Kingsland: I don't think there has been any proof of the letter or any connection with any of the issues here.

The Court: You will have to connect it up.

Mr. Townsend: Well, Mr. Neher, I understand, wrote this letter.

Mr. Kingsland: We don't deny the authenticity of the letter.

Mr. Townsend: Q. You received it from the company?

A. I received it from Mr. Weil, the attorney for the Safeway Stores.

Mr. Townsend: I think that connects it, your Honor.

Mr. Rogers: You have not connected Neher-Whitehead Company.

Mr. Townsend: Well, Mr. Neher——

Mr. Rogers: What has that got to do with that suit of the Pevely Dairy Company?

Mr. Townsend: It has to do with our counterclaim, your Honor.

Mr. Rogers: Counterclaims against the Neher-Whitehead Company? You can't counterclaim against the Neher-Whitehead Company, you have to get service on them in St. Louis.

(Testimony of Harry S. Borden.)

Mr. Townsend: We counterclaimed against the Pevely Company, who is responsible for this suit.

Mr. Rogers: For the suit, yes.

Mr. Townsend: And the acts, your acts are the acts of them, and their acts are your acts. [256]

Mr. Rogers: I don't quite get that.

Mr. Townsend: And any unlawful interference with our patent, either by you or the plaintiff under the very circumstances you set out here makes it actionable against the Pevely Company.

Mr. Rogers: Your Honor, the whole situation is annoying, because of the fact it appears we are trying to keep out something that was wrongfully done. He is claiming Neher-Whitehead Company committed some unfair competition against his client. The Neher-Whitehead Company is not a party to this suit, and you show no agency and can show no agency between the Neher-Whitehead Company and the Pevely Company. You have a license which says they are an exclusive licensee.

Mr. Townsend: I claim the axis of this suit is the patents in suit.

The Court: Well, I take it the letter discloses——

Mr. Townsend: The letter discloses that they claim to be the owner of these patents, and later on Kingsland's letter substitutes certain patents, but this is——

The Court: A third party sending it?

Mr. Townsend: Neher-Whitehead.

The Court: Is he a party to this suit?

(Testimony of Harry S. Borden.)

Mr. Townsend: Mr. Neher?

The Court: Yes.

Mr. Townsend: He is the licensee and he states in here that this suit is being brought by the Pevely Company, and, of course, on their behalf.

Mr. Rogers: We haven't said that.

The Court: Let me see the letter.

Mr. Townsend: Yes, your Honor.

Mr. Rogers: It is brought by the Pevely Company on its own [257] behalf at the moment.

Mr. Townsend: Here is a broad, sweeping allegation, a letter sent out there not specifying any particular patent, but apparently including all the patents they have.

Mr. Rogers: You just said a minute ago these particular patents were specified.

Mr. Townsend: Weren't they specified?

Mr. Rogers: I must have misunderstood you, because I understood that very definitely.

The Court: I will allow it to come in subject to a motion to strike and over your objection.

Mr. Townsend: That is Exhibit U.

(The letter was marked "Defendant's Exhibit U.")

Mr. Townsend: Q. Did any other concern or customer, prospective customer, come into that picture? A. Yes.

Q. As a result of these threats?

The Court: What threats? This is the only one that is shown. "These threats."

(Testimony of Harry S. Borden.)

Mr. Townsend: I see your point, your Honor.

The Court: I struck out the other testimony as a conclusion. You must connect it up if it is to remain in the record.

Mr. Townsend: Q. As a result of these patents here in suit, what have you had to do, or what obstacles have you met with in the sale of your collars?

Mr. Kingsland: That is entirely too general and indefinite.

The Court: Calling for an opinion and conclusion of the witness. Develop the facts, whatever they are.

Mr. Townsend: Well, I will. If it is not developed it may go out.

The Court: It is calling for an opinion and conclusion of the witness. [258]

Mr. Townsend: Q. Did you have to in any way change your policy in regard to making sales as a result of these patents? A. Yes.

Mr. Kingsland: That is calling for a conclusion. It is not in support of any counterclaim, your Honor.

Mr. Townsend: Well, what, if anything, did you do in order to obtain sales, or did you meet any resistance in the sales as a result of outstanding patents?

A. We met resistance on the part of prospective customers that there were other existing patents and they had been told ours were an infringe-

(Testimony of Harry S. Borden.)

ment, that the articles we were manufacturing were an infringement, and that we would have to secure them against loss. One particular company was the Golden State Company, and an agreement we gave them, drawn up by their attorneys, Pillsbury, Madison & Sutro——

Q. Before you could sell the Golden State?

A. Before we could sell them.

Mr. Kingsland: That portion of the answer that was clearly hearsay——

The Court: That may go out.

Mr. Townsend: The hearsay part.

Q. You had, as a fact, or did you not have, as a fact, complaints being made to you such as you have described? A. Yes.

Q. That is a fact?

A. That is a fact.

Q. The Golden State Company required, you say, what?

A. A document which was drawn up by Pillsbury, Madison & Sutro and approved by yourself, wherein we agreed to indemnify them against any loss that might come through a suit against them through the use of collars manufactured by us.

Q. And any other companies that you can mention?

A. Yes. We done the same thing with the Borden Company, and the same thing [259] with the Bell-Brook Dairies, and for several other users.

(Testimony of Harry S. Borden.)

Q. Did you lose sales because of any such situation?

A. Yes, we did. We lost a year's contract with the Golden State Company because of that.

Mr. Kingsland: Of course, your Honor, that must be a conclusion.

The Court: That will go out.

Mr. Townsend: Q. Have you any specific cases that you know of you lost in sales?

A. Yes, the Marin-Dell Dairy.

Q. Before you ever started in the manufacture of collars did you investigate the patent situation?

A. Yes, we did.

Q. As a result, were you advised whether what you were going to do about bottle collars would infringe or would not infringe?

A. Yes, we were so advised by your office in every instance.

Q. Now, let's turn to these different labels of yours that have been offered in evidence. If your Honor would turn to this little booklet, the analysis of claims, I am going to refer you to Plaintiff's Exhibit 3, which appears to be a duplicate of the No. 1 label on the chart Exhibit I. You show the Court how those ends are united.

A. Yes, like that.

Q. You have united those ends of the piece of paper? A. Yes.

Q. Do those connecting means permit enlargement of the upper diameter of the member?

A. No, they don't.

(Testimony of Harry S. Borden.)

Q. Will you show the Court why that is not so?

A. This little ends projects down here, hitting the bottom of the slot, doesn't permit it to move, at all on top. This doesn't permit it to open any wider at the top.

Mr. Townsend: Your Honor recalls that that opening, there, is the so-called pivotal action of all the claims of 1829.

Q. Now, take Exhibit 4, Plaintiff's Exhibit 4, which, I believe, is identical with Nos. 2 and 4 of the chart Exhibit I. Will you [260] do the same thing for his Honor, interlocking those ends?

A. It has an extra hook at the bottom so when the girls put them together they press that little hook over there, and that locks it in there.

Q. Does that interlocking means permit enlargement of the upper diameter of the collar?

A. No, it doesn't.

Q. Are there any means whereby the smaller end of the device may be enlarged to permit the device to be passed over? A. No.

Q. What you said in regard to one of those devices, Exhibits 3 and 4, applies equally to the others? A. Yes.

Q. Now, referring to Plaintiff's Exhibit 5, which is No. 3 on Chart I, being the "Yes" and "No" Health Bonds. Will you interlock that for his Honor?

A. Yes. The reason we discontinued this type, which is the original one we manufactured, the

(Testimony of Harry S. Borden.)

reason we discontinued it is because it has a tendency to fall apart through use.

Q. Does that device, Exhibit 5, of the "Yes" and "No" bonds have locking devices to permit enlargement of the upper diameter? A. No.

Q. Does it have means whereby the smaller end of the device may enlarge and permit said device to be passed onto a support? A. No.

Q. Did you show that to his Honor, how that was done? A. Yes.

Q. Plaintiff's Exhibit 4, wasn't that before you?

A. We went through it.

Mr. Townsend: Plaintiff did not charge infringement of this Exhibit 4, which is identical in outline with Exhibit No. 4, or with No. 4 on Chart I of the single claim of patent 1,923,856.

Q. Now, just show the Court the form of tongue and locking that you have there, and then I want to ask you if that tongue is provided with parallel sides, edges. A. No, it is not. [261]

The Court: What do you mean, "parallel"?

A. Well, the edges here.

Mr. Townsend: Q. What kind of side edges are they?

A. They are convergent, they converge.

Q. Form an "A" shape, practically?

A. Yes.

Q. Now, do you know where these parallel side edges are in the patent, 1, 923,856, shown on Chart Exhibit A?

(Testimony of Harry S. Borden.)

A. Yes, they are on a tongue, the left-hand corner.

Q. Will you look down here and tell the Court what the number of the tongue is, and what the number of the parallel edges are?

A. Parallel side edges, here, are 5 and 6—no, 6, 6 and 8. I presume those are right on the line.

Q. Now, 5 is the——

A. The line, here, 5, indicates right the center of the tongue.

Q. 5 is the tongue, itself? A. Yes.

Q. 6 and 8 are the side edges? A. Yes.

Q. Show the Court if there is anything in there that corresponds to that——

A. No, there isn't anything on here to correspond to that.

The Court: Here it is on the right, there, and here is the left.

A. If you turn it around you still don't get it.

Q. How do you describe or differentiate between this——

A. Well, that is a tongue.

Q. What do you mean by a tongue?

A. A piece that protrudes of the parallel edge and this is what we term a fishtail lock. That is a trade name.

The Court: This is a lock and this is the tongue?

A. Yes. That is the tongue and this is the lock.

The Court: All right.

Mr. Townsend: May I ask counsel if this No. 7 of the Chart [262] Exhibit I was offered?

(Testimony of Harry S. Borden.)

Mr. Rogers: That was in your Bill of Particulars.

Mr. Townsend: In other words, the Bill of Particulars—did you put it in evidence?

Mr. Rogers: I don't remember that we did. I don't think we did.

Mr. Townsend: You gave me a letter in which this is specified as alleged to infringe claim 4 of 1829.

Mr. Rogers: Well, I don't remember that we put it in.

Mr. Townsend: I want to know whether you are relying on it.

Mr. Kingsland: Yes. That was one of the ones within the Bill of Particulars.

Mr. Townsend: Within your charge of infringement?

Mr. Kingsland: Yes.

Mr. Townsend: I don't know whether it is in evidence or not.

The Court: I don't think it is marked yet.

Mr. Townsend: Do you want to put one in now?

Mr. Rogers: Well, you put it in.

Mr. Townsend: Well, it is in so far as appearing here on the chart, Exhibit I, and I will show this to the witness. I will hand a duplicate to the witness and direct the Court's attention to this analysis of Claim 4. We have taken their statement that that is alleged to infringe Claim 4 of 1829.

(Testimony of Harry S. Borden.)

Q. How is that article purchased and delivered in the trade, Mr. Borden?

A. In a flat manner, such as you see here.

Q. Collapsed? A. Yes.

Mr. Townsend: I ask that that be marked Defendant's Exhibit.

(The card was marked "Defendant's Exhibit V.")

The Witness: If they want to order merchandise of any par- [263] ticular type on there they indicate it with the tab.

Mr. Townsend: Q. Show the Court how that is placed on a bottle.

A. This is an order indicator. It is left by the delivery man with the housewife for convenience in ordering whatever she might desire at a particular day, by placing it over the top of the bottle and setting it outside her door, and when he comes, whatever the tab shows that she might desire he leaves the required quantity of the various kinds of merchandise, and she can order on here whatever she wants, and if the quantities are not sufficient, as shown, for instance, if she wants four quarts of milk and it only indicates three on here, she puts up the little sign that says, "Ring bell." No. 2 is milk, No. 3 is Golden Guernsey milk. No. 4 is "Milk, extra pint." No. 5 is, "Churned buttermilk." No. 6 is cottage cheese. No. 7 is pastry cream. No. 8 is table cream. No. 9 are eggs. No. 10 salted butter. No. 11 chocolate drink. Then around the edge of the indicator there are things to indi-

(Testimony of Harry S. Borden.)

cate such quantities as pints, half pints, quarter pints, carton, glass, large, small, three dozen, two dozen, one dozen, two pounds, one pound, three quarts, two quarts, quart.

Q. Now, what we are interested in, Mr. Borden, is the way the collar is made, and the way it is connected at the ends. Will you show the Judge how that is done, and explain as you go along?

A. This is manufactured out of two separate pieces of paper. The order blank is one piece, and the collar portion is another piece, and they are riveted and stapled together to keep in a stationary position, so they won't move, and the order tabs are made of a lighter weight piece of heavy cardboard. That is the manner in which it is constructed.

Q. In other words, you have both a staple and an eyelet? [264]

A. Yes.

Q. Is there any permissible movement between the two ends?

A. None, whatever.

Mr. Rogers: I am somewhat amazed at the trend this has taken, because they apparently are wandering from their Bill of Particulars. I have before me a similar collar that was supplied with the Bill of Particulars, and it does not have a staple. It is merely a rivet run through here and connects the two ends with the most obvious pivotal connection that can be possible.

The Court: Explain that.

The Witness: I might state, your Honor, that that possibly was overlooked by the girls in the bindery room. They stitch these things, they might

(Testimony of Harry S. Borden.)

not have stitched them all, but the instructions are, of course, to stitch each and every one.

Mr. Rogers: We don't care which they wish to do, because when they affix it it is under the 1,999,011 patent, because of its shape, and when they pivot it it is under the 1,829,915 patent; when they use both ways it is under both patents.

The Court: I think you have taken counsel by surprise. What explanation have you got for that?

Mr. Townsend: What he says here is news to me, and if he tells me that that was in that way we accept it. Apparently they do it both ways. We won't hide under the skirts even of a stenographer.

Mr. Rogers: All we want to do——

The Court: There is an honest mistake.

Mr. Rogers: Apparently so. All we want is to be sure that we can hold the riveted one under the 1,999,011 patent, because they required as a substitute——

Mr. Townsend: Well, if you want to include it under both [265] patents——

Mr. Rogers: Yes, that is all we want to do.

The Court: I think you will find him very liberal.

Mr. Townsend: Do you want to offer this particular one?

Mr. Kingsland: We understood it was in, because you attached it to your bill of particulars. You pleaded that, did you not?

Mr. Townsend: It is not part of the Answer until it is alleged.

(Testimony of Harry S. Borden.)

Mr. Rogers: You are assuming a bill of particulars is not a pleading.

Mr. Townsend: All right.

Q. If you will look at this Claim 4, at either one of those; will you state whether when that is on the bottle does the lower diameter of that device approximately equal the body portion of the bottle?

A. No.

Q. Tell the Court why that is not so.

A. The reason it does not equal the body diameter of the bottle is because we want it to hang on the neck.

Q. Go ahead.

A. And keep it as near upright as possible. That is the reason we put the shoulder on it underneath, to draw it forward so if the dairy man has to go upstairs he doesn't have to run all the way up the stairs to look down on it, he can look up at it and see what the customer desires, and save steps for the dairyman in that particular instance.

Q. In short, the piece down below, I mean the lower edge of that collar is cut on that in wavy lines.

A. Yes.

Q. With deep indentations? A. Yes.

Q. And forms a shoulder? A. Yes.

Q. And the shoulder raises the——

A. The lower part of the neck [266] of the bottle.

Q. The shoulder of the bottle? A. Yes.

Q. That is why you say that that device doesn't

(Testimony of Harry S. Borden.)

have a lower diameter or lower perimeter approximately equal to the body portion of the bottle?

A. That is correct.

Q. Now, when you fasten it with a staple as well, do you have any pivotal action?

A. None, whatever.

Q. When we fasten it with a staple likewise do we have a collar then that has a lower diameter approximately equal to the body portion of the bottle? A. No, we haven't.

Q. That is because of the construction you spoke of? A. Yes.

Q. Of the irregular indentations of the lower edge? A. Yes.

Q. At every part of that edge is it a different distance? A. Yes.

Q. From the axis of the bottle? A. Yes.

Q. Now, we are referring to patent 1999, which is their fixed patent; Claim 3 is an irregular perimeter around the bottom there. Is that lower edge, irregular lower edge, or the larger end of the bottle, at any time concentric with the axis at different points on that perimeter?

A. No, it is not.

Q. At all those points they are concentric one with the other? A. No, sir.

Q. Or even if that is stapled it lacks the essential qualities that I have read to you just now?

A. Yes.

(Testimony of Harry S. Borden.)

Q. In regard to Exhibit 21, and we will refer to both 21 and 22 collectively, because they have been alleged to infringe claim 3 of this patent 1999, the text of which I have just read with regard to concentricity, and in regard to interlocking. In the first place, are the bottom edges of those Exhibits 21 and 22 such that the lower—you might say the lower diameter is approximately equal to the body portion of the bottle? A. No. [267]

Q. Will you put one of those on that one and show the Judge how you unite those?

A. The girls when they lock them, both ends together, automatically lock.

Q. In other words, you fold in the two tongues and attach in the end tongue and the inner tongue and slide it into the "X" position of the slot?

A. Correct.

The Court: Do that again, do it slowly.

Mr. Townsend: Now, that lower edge—

The Court: Did you say that fits like a glove?

Mr. Townsend: Oh, they all fit like a glove, even on a lamp shade.

Q. Are the lower edges of those devices concentric? A. No.

Q. With the longitudinal axis of the bottle?

A. No.

Q. Isn't it a fact every point on this lower perimeter is at a different distance from the axis?

A. Yes, that is correct.

(Testimony of Harry S. Borden.)

Q. Then you would say it is eccentric, would you not?

A. I presume that is the term used.

Q. What would you say as to the connection that you have there, are those connections in that "X" slot rendered so that the ends are movably connected?

A. No, they are immovable, because it comes right apart.

The Court: What is the position when they are locked?

A. When they are locked together it is for the purpose of keeping the upper part, here, from moving at all, from pivoting, but it is not immovably fastened together.

Mr. Townsend: Q. Now, you take Plaintiff's Exhibit 25. Will you show the Judge how it is united?

A. That way, that slips over and an extra slot in that bottom that permits the pivot to open at the top.

Q. Is that any more immovably connected, that Exhibit 25, than [268] the one that you referred to as Exhibits 21 and 22?

A. No. They can be taken apart, too.

Q. When you refer to it being immovably connected, what do you understand by that in the trade?

A. That they be fastened with glue or staples, something of that nature.

Q. Just what "immovable" means?

A. Yes.

(An adjournment was here taken until tomorrow, Thursday, October 19, 1939, at ten o'clock a.m.)

[269]

Thursday, October 19, 1939.

HARRY S. BORDEN,

Direct Examination
(Resumed)

Mr. Townsend: Q. Mr. Borden, last evening you had stated that while Exhibit 25, the collar of the plaintiff, had that so-called pivotal action to permit the upper end of the collar to expand sufficient to do its purpose you said the defendant's collar, represented by Exhibits 3, 4, 5, and 21 and 22 did not have such pivotal action. Will you briefly explain to the Court just why there is pivotal action permitted in one and not in the other?

A. The reason for pivotal action in this particular collar, here, No. 25, is because of the angular slot at the end, main slot over there, and the angular slot there. That permits this collar to lock together and slide down there, like that. The top of the bottle is such that one side is different from another, and that permits that to open by sliding down and drops down over the enlarged top of the bottle. That is the pivotal action.

Q. That portion, the angular portion——

(Testimony of Harry S. Borden.)

A. Yes.

Q. Is that the top?

A. No, that is at the bottom, to permit the body of the collar to slide through there and open up.

Q. Speaking in regard to the defendant's structure, why can't you have that pivotal action?

A. Because we do not have an angular slot.

Q. In other words, your slots are straight?

A. Straight down, but the shoulder of the collar abuts against the bottom of the slot and doesn't permit any movement of any kind.

Mr. Townsend: Is that clear to your Honor?

The Court: Yes.

Mr. Townsend: Q. Have you a specimen here to show how that [271] interlocking will work on that angular slot?

A. As I testified here yesterday, that it was common practice in the industry in the manufacture of folding boxes to permit the box to be united and put together to purposely make the angular slot exactly the same as the plaintiff's collar. That has been common practice in the business ever since I have been in it, and I have been in it since 1902.

Mr. Townsend: I offer this sample blank he just referred to as Defendant's Exhibit W.

(The device was marked "Defendant's Exhibit W.")

Mr. Townsend: Q. Have you a publication in which appears an example of a lamp shade or a candle shade of conical form? A. Yes.

(Testimony of Harry S. Borden.)

Q. I will ask you to state if you know anything about the catalog that you hold in your hand?

A. That catalog was designed and printed in my plant in 1927 for the Dohrmann Commercial Company, and it contains examples on page 56 of candle shades which are exactly the same conical design as the bottle collars.

Q. How is that particular illustration you refer to identified in the catalog?

A. By the description below the article, described as either in paper or parchment.

Q. What is the entitlement of that?

A. Banquet candle holder and shade.

Q. Have you been able to find a sample—strike that. Had you finished your reference to the catalog?

A. The same thing in the same catalog on page 260 applies to bridge and junior floor lamps of paper and parchment shades made the same way.

Q. Is there anything here in this court-room that would be typical [272] of such a lamp shade as would be illustrated in the book, here? A. Yes.

Q. I am referring in use at the present time.

A. The shade on the electric light globe on that gentleman's desk, there.

Q. Referring to the one on the Clerk's desk?

A. That is the same general design, conical design.

Q. How long have you known of shades of that character? A. Ever since I can remember.

(Testimony of Harry S. Borden.)

Q. Would that be ten years, twenty years?

A. I would say that would be easily 40 years.

Q. Have you any other shades?

A. Yes, I have one here that I purchased yesterday afternoon from the Woolworth store at Fifth and Market.

Mr. Townsend: I want to offer, your Honor, these two pages referred to in the catalog mentioned by the witness, page 56 of this catalog No. 28, Dohrmann Hotel Supply Company, the illustration that is marked or entitled "Banquet Candle Holder," and ask that that be marked, let that be included in part of the book which we will call Exhibit X, only the two I refer to will be—the illustration of Bridge Lamp appearing on page 260 of this catalog, that illustration on page 260, and the illustration on page 56 constituting the portion of Exhibit X to which we refer.

(The catalog was marked "Defendant's Exhibit X.")

Mr. Townsend: Now, the little lamp shade that the witness just referred to as having purchased at Woolworth's yesterday, I will ask that be marked Exhibit Y.

(The lamp shade was marked "Defendant's Exhibit Y.")

Mr. Townsend: Q. Have you any other sample which would correspond to anything shown in that Dohrmann Hotel Company catalog, Exhibit X?

A. Yes, I have here two drinking cups with the

(Testimony of Harry S. Borden.)

bottoms [273] taken out, of the same general design as the bottle collars.

Q. Would they be capable of use as a candle shade?

A. They would be capable of use as a candle shade and as a bottle collar, also, if it was large enough to fit over the neck of the bottle.

Q. That has no pivotal action, however, has it?

A. No, positively not.

Mr. Townsend: I offer this conical shade he just referred to as Exhibit Z.

Mr. Kingsland: Just for the purpose of the record, I object to it as immaterial. Of course, it is not proven part of the prior art.

The Court: I will allow it in the interest of time.

(The shade was marked "Defendant's Exhibit Z.")

Mr. Townsend: Q. Reference has been made here to a consent decree that was entered in this court in the case of this plaintiff against a party by the name of Manhart. Do you know who Manhart is? A. Yes, I know him very well.

Q. Who is he, or who was he?

A. He operates by himself, using the specific of your company's office as his headquarters in the manufacture of a bottle collar that was printed in the specific of your office and die-cut by Fibreboard Products, San Francisco.

Q. Is he in business to-day?

A. No, he is not.

(Testimony of Harry S. Borden.)

Q. In the collar business? A. No.

Q. Did he have any office and shop of his own?

A. No, he never had a shop of his own.

Mr. Townsend: That is all.

Cross Examination

Mr. Rogers: Q. I show you Exhibit W. Will you fold up [274] one corner for me? Does it pivot?

A. I never said it pivoted.

Q. No, I am asking you the question.

A. It slides back and forth.

Q. Now, in so doing are you deforming this part of the bottom in sliding it back and forth?

A. You do there, yes.

Q. Mr. Borden, how did you happen to go into the manufacture of bottle collars?

A. Through the demand of customers for different types of products.

Q. What was the first bottle collar you ever saw?

A. I don't recollect just exactly what was the first bottle collar. My first recollection of anything around a bottle are bottle hangers.

Q. Up until the bottle collar began to be used the bottle hanger was the predominant form of advertising in the milk industry for advertising to go direct to the consumer? Will you answer that question?

(Question read.)

Q. Is that clear to you? A. No.

Q. I will try to make it clearer. You said that you had known of bottle hangers, or so-called flat

(Testimony of Harry S. Borden.)

hanger type of advertising for direct consumer advertising by the dairies, and my question is was that the dominant form of advertising, was that kind used by the dairies prior to the advent of the bottle collar?

A. It was in the area in which I operate.

Q. Well, that is all you can speak of. You don't remember whose was the first, or what was the first bottle collar you ever saw? A. No, I do not.

Q. Do you remember how long ago it was?

A. No, I cannot say exactly as to that, either.

Q. Well, give us a guess.

A. I wouldn't even attempt to guess at it. It is a number of years; just how many I don't remember.

[275]

Q. Would you say it was prior to 1935?

A. I would say yes, that it was prior to that.

Q. Would you say it was prior to 1930?

A. I wouldn't say as to that.

Q. In other words, it may have been sometime between 1930 and 1935?

A. I couldn't even say as to whether it was or it wasn't.

Q. Do you remember getting out this catalog in 1927? A. Yes, I do.

Q. Referred to as Exhibit X, but you could not remember when you first saw a bottle collar?

A. No.

Q. When did you first know that Neher-Whitehead & Company claimed to be a licensee under the Wasser patent?

(Testimony of Harry S. Borden.)

A. It was when we solicited business, general business. We were at that time soliciting what we termed "Car front" for Marin-Dell Dairy, and we were asked if we could produce some bottle collars, and they showed us one that was produced by the Louis Roesch Company, here in San Francisco.

The Court: Where is that? Have you one?

A. I haven't any, your Honor.

Mr. Rogers: Q. That was when you first knew that Neher-Whitehead claimed rights under the Wasser patents now in suit? A. Yes.

Q. How did that fact make you aware of the existence of the Neher-Whitehead claim?

A. Because they also showed me samples of collars that they had received from Neher-Whitehead.

Q. When was that?

A. I think that was in either the latter part of 1936 or first part of 1937.

Q. Was that before you went into the business of making bottle collars, yourself, or the Borden Printing Company?

A. We had made designs to go around bottles before that time, but as to whether they were bottle collars or not is a question. In other [276] words, we had endeavored to make what we termed hangers, as we called them at that time, not calling them bottle collars or cuffs, or anything, but bottle hangers of different designs to fit over bottles.

Q. So you will say that that was prior to your

(Testimony of Harry S. Borden.)

own entry into the field of bottle collars as they are represented in this suit?

A. In a general way, yes.

Q. When did the first representation come to you that Neher-Whitehead & Company might, or that at least somebody might bring suit against you under the Wasser patents?

A. The first notice somebody might bring suit against was when Mr. Neher appeared in my office, as I testified yesterday.

Q. Was he pleasant to you?

A. He seemed to be slightly pleasant, although he seemed to be irritated also.

Q. He told you that you should stop making the collars you were then making because he felt they infringed the patents now in suit?

A. He told us that they infringed his patents, and I questioned his statement, and told him to confer with our attorneys.

Q. You felt his claim was unjustified?

A. I did, on the strength of the advice we had received prior to that time from the firm of Townsend & Hackley before we endeavored to manufacture any.

Q. You feel that that action on his part constituted an unnecessary harassment to your activities?

A. Yes.

Q. In other words, you felt this bottle collar business was not very well subject to patent protection?

(Testimony of Harry S. Borden.)

A. I didn't feel that way about it, at all. I felt his view of our product was wrong.

Q. You feel that bottle collars are the subject of patent protection?

A. I don't quite get what you mean.

Q. I mean, you think that bottle collars can be patentable subject-matter? [277]

Mr. Townsend: Your Honor, I think he can be more specific. The question is too general. He is talking about a specific patent apparently covered by a specific device, or a specific device apparently covered by a specific patent. That does not mean there is nothing in the patent, at all.

Mr. Rogers: You concede there can be patents on bottle collars that are valid patents?

A. I will concede this, that there can be patents on most anything that is devised originally.

Q. Do you concede, furthermore, there may be patentable subject-matter in bottle collars?

Mr. Townsend: Your Honor, I think that is getting to be speculative and argumentative.

Mr. Rogers: I will connect it up.

Mr. Townsend: I don't object to any reasonable inquiry that will bring out any light.

The Witness: Well, I'll say this to you, Mr. Rogers, that from a layman's point of view, I am not qualified to say as to whether it is or not, that would be a matter for my attorney, or somebody else's attorney, to decide, who would be qualified in this particular portion of the law.

(Testimony of Harry S. Borden.)

Mr. Rogers: Q. Well, would you be so bold as to venture to get patents on bottle collars?

A. Yes, we have.

Q. How many have you tried to get?

A. I don't know exactly how many, but some.

Q. So you or the Borden Printing Company have actually solicited patents on bottle collars?

A. That is true.

Q. Does that explain the fact that all of the bottle collars, as I see the exhibits, everyone of these has marked on it a notice, "Patent pending." In other words, in every one of these bottle collars, you, yourself, have solicited patents on?

A. That is true. [278]

Q. I call on you to state how many applications there are. If it requires consultation with your—

Mr. Townsend: That is not proper cross-examination. He is inquiring into a private matter which is no concern to us at this time.

Mr. Rogers: I have not asked for any details of anything. I have asked how many there are.

The Court: You are limited to his direct examination.

The Witness: Whatever those appear there.

Mr. Rogers: I think you said there were eleven on here, so you have eleven applications here?

Mr. Townsend: I think that is a perfectly absurd conclusion to draw, your Honor.

Mr. Rogers: I ask him now how many there are.

The Court: If you know answer.

(Testimony of Harry S. Borden.)

A. I don't know, your Honor, just exactly how many there are.

Mr. Rogers: Well, I call upon you to find out.

The Court: You can call upon his attorney, and I don't know whether he can make his attorney answer.

Mr. Townsend: That is a private communication, your Honor.

The Court: No, these are in evidence. He has a right to inquire.

Mr. Townsend: So far as the number, I can't—maybe Mr. Roemer could answer that, because he has handled these applications. We haven't any objection to that, but we think it is very far afield.

Mr. Rogers: If you will guess at the number, possibly that will do. While we are getting that information may I ask if these applications were filed in your name or somebody else's name in your company?

A. Some were filed in my name and some were filed in the name of another person. [279]

Q. Yes. Such as you, yourself, filed, an indeterminate number, you swore in an oath you had invented things that were new and useful, and, hence, subject to patent protection, in your opinion?

A. That is correct.

Mr. Townsend: We will give you the answer in just a minute. Mr. Roemer informs me he believes three applications have been filed at various times, and there has been favorable action apparently on

(Testimony of Harry S. Borden.)

only two of them. One involved a structure blank like Defendant's Exhibit C, No. 3 of this chart Exhibit I; that has a peculiar form of cut. Now, we can argue from this——

Mr. Rogers: Well, before we argue——

Mr. Townsend: Well, I just want to state, this is the one on which application we have some allowed claims. The other concerns the number 8, which you have generously admitted does not infringe, and some allowed claims have been made on that. Will you open that, please, if I may, to show just how it works, and what it is constructed of, and how it looks when it is opened up. In other words, it is a piece of paper.

The Witness: A piece of paper die-cut.

Q. That is continuous in its outline?

A. Correct.

Q. No seams, no locks?

A. No; one continuous piece of paper.

Mr. Townsend: Pardon me for interrupting, I wanted to get this straightened out for you.

The Court: Well, I have no objection to your doing that.

Mr. Rogers: When you folded that up before the Court——

Mr. Townsend: Just a moment. I want to have this blank marked Exhibit AA.

(The blank was marked "Defendant's Exhibit AA.")

(Testimony of Harry S. Borden.)

Mr. Rogers: Q. That order blank folds inside the collar that holds it together? A. Yes.

[280]

Q. This is the way it is folded. This is turned up inside of the collar——

A. No, that order blank does not hold the collar together, but, rather, the two folds that go inside here are the things that hold it together when it gets to the neck of the bottle.

The Court: There is a bottle there.

The Witness: The order blank would be in it, that holds it on the bottle, there.

Mr. Rogers: I see.

The Court: You have no objection to using that, have you?

Mr. Rogers: Well, it is not involved in this litigation.

Q. At the time you made your oath in these applications, or oaths, as the case may be, you knew of all the prior art that you produced in this litigation, I assume?

A. I did know of all of it, because research was made by our attorney, and whatever we did we did on the advice of our attorney.

Q. In other words, your oath was made on insufficient information? A. I wouldn't say that.

Q. Which of all of this art that has been adduced in this litigation didn't you know about at the time you made an oath, those oaths?

Mr. Townsend: Your Honor, this gentleman has

(Testimony of Harry S. Borden.)

not been interrogated about prior art, at all. He is not a patent expert. He is a practical man.

Mr. Rogers: He is also the applicant in some of these cases who has made oaths that he was the alleged inventor of some of these bottle collars.

Mr. Townsend: That's all right. Every applicant for a patent, as you know, has to conform to the prosecution of the patent as provided in the statute. [281]

Mr. Rogers: I don't see counsel's point. I asked him what he knew.

Mr. Townsend: If you ask whether he has complied with the statute we will say yes.

Mr. Rogers: I don't know whether he complied with the statute or not. The question is what he knew when he made an oath, how much of this stuff did you know, this prior art did you know about at the time you made that oath.

A. I will say again whatever I did I did under the advice of my counsel.

Q. But you made the oath, your attorney did not make the oath? A. That is true.

The Court: He said he did it on the advice of his attorney. I suppose many an unfortunate fellow has done that.

Mr. Rogers: Q. I suppose you knew about this Dohrmann catalog, No. 28, your Exhibit X, at the time you made your oath? A. Yes.

Q. I assume also your bottle collars are conical in the same manner as those of the patent; in other

(Testimony of Harry S. Borden.)

words, the lamp shade that is referred to here, for example, is just as pertinent to your own application as it is to those in suit, is that right?

A. No, it is not right. Ours are not the same design as yours are.

Q. I did not ask you that. I asked you whether the ones that you have are not conical and like lamp shades in the same nature that those in suit are; in other words, if those in suit are like lamp shades, so are yours, aren't they?

A. Yes, in a general way, yes.

Q. You testified yesterday as to the action in certain of these collars that you made. Now, I am referring to Plaintiff's Exhibit 5. You see that I folded that up in the way it naturally folds up?

A. Yes.

Q. You also see that I attempt to put that on over the bottle? [282]

A. Just a minute. When you said that you folded it up the way it goes, you deliberately folded that and pressed it in, you forced it in.

Q. I beg your pardon. A. You certainly did.

Q. You can do anything you want with it.

A. That is exactly what you did.

Q. I challenge your statement flatly. I am merely trying to get at the point——

A. That is the correct way.

Q. All right. I want you to watch me to be sure I do this right, because I am not trying to do anything that is wrong here. We want just to get at the

(Testimony of Harry S. Borden.)

truth. I want you to state whether or not that collar goes on over the flange of the milk bottle with no pivotal action, and let me get where the Court can also see it. A. There is no pivotal action there.

Q. There was no relative movement of the two ends of this collar about this crotch right there?

A. No.

Mr. Rogers: I don't know what to say, your Honor.

Mr. Townsend: I object to any comment.

The Court: Well, that is the way they try their cases in St. Louis. I suppose familiarity breeds contempt when I try to lighten the burden here in these patent cases and everybody is so temperamental and everything is so serious, so it may be that I should not do so. However, we will proceed.

Mr. Rogers: Q. What is your understanding of pivotal action?

A. My understanding of pivotal action is something that will move on a curve, the same as your collar does with the extra slot on it. Without the extra slot you do not get pivotal action.

Q. Well, now, let's see. Let's take this collar, Exhibit 5, and open it, and I will ask you to close it again and lock it. I ask you whether the top opening is sufficient, if it can pass [283] over the top of a milk bottle.

A. Well, the way that has been bent so many times there, and creased, it looks like the opening there is too small, but it is not. You have bent and creased that so much.

(Testimony of Harry S. Borden.)

Q. I have not bent it, Mr. Borden.

A. The opening is big enough to go over any milk bottle. It is merely a matter of forcing it over the top.

Q. Did you change the shape of the opening when you passed it over the top of the bottle, when you just put it on the bottle?

A. You don't change the shape of the opening, because the shape is bent and remains the same.

Q. I call your attention to the fact that the bottle collar, as it was before you put it on——

A. It is set in that shape. That opening in there is large enough to put on the top of the bottle.

Q. Before it goes on the bottle what is its shape?

A. That is the shape when put together properly.

Q. Well, put it together properly and hold it away from the securing means.

A. It is there right now.

Q. Will you hold it by the front with your hand and complete it, the securing means?

A. Well, it has been bent and battered so much there isn't anything you can do with it right now.

Q. I will now take the collar designated as Plaintiff's Exhibit 3 and ask that you close that collar. Now, I will ask you whether in operation the two ends of this collar pivot——

A. When that collar is put together, there, in the proper way to fit it to the milk bottle there is no pivot action.

Q. In other words, you can——

(Testimony of Harry S. Borden.)

A. You can force it into any shape you want, because it is only a piece of paper.

Q. I don't want to force it at all.

A. That is exactly what you are doing. It is not the natural shape as it lays together. [284]

Q. Let's put it on a bottle.

Mr. Townsend: Notice that it dropped right over the bottle top without any expansive action at all.

Mr. Rogers: I take it counsel's argument will be duly entered on the record.

Mr. Townsend: Well, you dropped it and it fell of its own weight on that bottle in position.

Mr. Rogers: To which I make no contention that it does not, of course.

Q. Will you nestle that on the bottle in the way it properly will be on the bottle in use, fit it down the way it goes?

A. They just drop them on the bottle, just exactly like that.

Q. All right. What is the approximate diameter of the lower part of that? A. I couldn't say.

Q. Relative to the size of the bottle.

A. I couldn't say as to that.

Q. You are not able to see whether that is the size of the upper flange of the bottle, or the size of the body portion of the bottle, or the size of—

A. The diameters in different portions are different all the way around the bottle.

Q. I am asking you about a specific diameter.

A. There is no specific diameter. They all change

(Testimony of Harry S. Borden.)

as the shape of the bottle changes, and as the shape of the bottle here, changes, the diameter changes.

Q. In other words, this bottle collar has several different shapes on this bottle?

A. No. I wouldn't say a different shape. It wouldn't take a different shape on any bottle. The shape would remain the same as the bottle is.

Q. But the shape of the bottle differs?

A. They might be different shape bottles. There are different shape bottles. [285]

Q. But it fits the same on all of them?

A. No, naturally, it wouldn't fit the same on all bottles.

Q. It differs as to——

A. The cream milk bottle has a bulge around the neck, and naturally, it wouldn't fit around the bulge of the neck in the same manner it fits there.

Q. Well, except the cream top bottle. Will you explain what the difference would be?

A. Well, I don't know what the difference in bottles would be, because I don't know how many types of bottles are used now.

Q. Now, this collar, Exhibit 3, on Exhibit H, I want to be sure that is the one you just used.

A. Correct, that is the one I dropped on the bottle.

Q. I will ask you to look at that diameter below the "K" in the word "Bisk" and ask you what is the relation of that diameter at that point to the diameter of the body portion of the bottle?

Mr. Townsend: On this witness' direct examina-

(Testimony of Harry S. Borden.)

tion my questions were not directed to that, they were all directed to the perimeter. We will show by our expert in regard to this thing——

Mr. Rogers: I did not know you had an expert in addition to this witness.

Mr. Townsend: I move that counsel's statement be stricken.

The Court: He has an expert that he will have here. This man is producing these.

Mr. Rogers: But he has testified as to the situation in regard to the terms of the patents.

The Court: You may examine him.

Mr. Townsend: Just a minute. I want to state here, when you were referring to a diameter "Bisk", the diameter at the point "Bisk", you are not dealing properly with the subject on cross-examination, because there is nothing from the witness that even [286] suggested diameter at that time. I suggested the diameter based on this sloping perimeter, and if you want to take one of your own discs and lay it out there and you want him to show you——

Mr. Rogers: No. I will just refer to the record.

The Court: Proceed.

Mr. Rogers: Is my question permitted, that he should state whether the diameter below the letter "K" is approximately the same as the diameter of the bottle, of the body portion of the bottle?

The Court: You may answer it if you know.

A. My understanding of it is that the diameter of the bottle is the main body portion of the bottle, itself. The diameter of the shoulder, as we term it,

(Testimony of Harry S. Borden.)

or the neck, varies from where it starts to taper down from the body of the bottle and it just barely is formed, and there are diameters in the collar that are exactly the same as some particular section, or some point on the shoulder or neck of the bottle, but there are no diameters in the collar that are as large as the diameter of the bottle, itself.

Q. In other words, it is your considered and reasoned statement that a diameter transversely across the bottle approximately at the bottom of the collar below the letter "K" is in substance the same as the diameter of the body portion of the bottle?

A. I wouldn't say as to that.

Q. You wouldn't say?

A. No, I wouldn't.

Q. Did you design this bottle collar?

A. Yes; worked out in my plant.

Q. Did you design it?

A. I worked on it along with others in my plant.

Q. Now, I take Exhibit 4, and I will ask that you interlock that exhibit. Have you ever seen these collars put on at [287] the dairies?

A. Yes, I have.

Q. Are they closed together in the plant or are they closed together at the dairy?

A. They are closed together in our plant.

Q. How are they stacked up?

A. 500 in a package. Some packages have a thousand and some packages 250.

Q. One within the other?

(Testimony of Harry S. Borden.)

A. They are what we called stacked one within the other.

Q. One within another?

A. One within another.

Q. I observe that you turned over the bottom tab on this collar at the time you locked it together.

A. Yes, I did it that time. That is to keep it from slipping out because this cut in here has been handled so much it has been enlarged terribly.

Q. Perhaps we have another one. Do you know whether you have one that has not been used?

A. No, I don't.

Q. I guess we are compelled to deal with this, then. It is your position that there is no pivotal action? A. That is correct.

Q. Do you observe that the lower side of this collar moves from a position wherein it is directly—

A. When that collar is put together properly there is no movement there at all, there is no enlargement of the top. The top remains the same. You can force it, it is only a piece of paper.

Q. Well, I don't want to force it. I am compelled—

A. That is what you have been doing.

Q. I am compelled to ask you then to produce one that is in the condition that it exists when—

The Court: Have you got one of these?

Mr. Rogers: Is that one satisfactory?

A. Yes, that's all right.

Q. I will hand you what purports to be a duplicate of Exhibit 4. [288] Let the record show the

(Testimony of Harry S. Borden.)

witness, himself, locked this collar together. Now, it is your position that there is no pivotal movement, whatever, in this collar?

A. That's right.

Q. And no possible enlargement of the upper diameter? A. Right.

Q. I will let you handle it, I don't want to be——

A. All right.

Q. That is never put any farther down on the bottle? A. Just dropped on the bottle.

Q. Just dropped on the bottle. Suppose you have a large cap on the bottle, for instance a seal cap that covers that, they wouldn't fit over the bottle?

A. We would make the necessary size for that particular type of bottle.

Q. Have you ever done that?

A. We have never made any for bottles of that type. They are not used here, that I know of. They haven't been used by any of the dairies that we have served, anyway.

Q. Have you ever seen some of these where this locking means slips over when the collar is in position on the bottle?

A. It can be forced, but it doesn't slip. It just stays naturally in one position.

Q. When it is connected at the back it never changes?

A. Not unless something rubs against it which,

(Testimony of Harry S. Borden.)

of course, being a piece of paper, it can be torn very easily.

Q. In other words, any forcing would actually tear the collar?

A. Any degree of forcing would be sufficient to tear it easily, because it is only a piece of paper.

Q. Well, in other words, it can't change its shape without being mutilated?

A. It can't change its shape without being mutilated.

Q. As I am nestling this down on that bottle, would you say I am forcing it?

A. When you press it down with your finger, naturally, [289] you are forcing it.

Q. I am forcing it down but am I mutilating it?

A. You are forcing it.

Q. Do I mutilate it? A. Not now.

Q. Has the upper diameter changed at all?

A. No. The diameter remains the same. You forced it then, you forced it open.

Q. All right. Will you close it again?

A. All right. There, it drops down on the neck of the collar and there it remains.

Q. Take it off and put it on again; open it up.

A. You are pulling it.

Q. Well, you turn it.

A. What's the idea of turning it? What is the reason for that?

Q. All right. If that is the way it is fastened together that's all right.

(Testimony of Harry S. Borden.)

A. It is fastened together in its natural position.

Q. Now, will you drop it over the bottle?

Mr. Townsend: Explain what you are doing.

A. There was nothing took place then, no change in the size of the collar there. It remains fairly stationary.

Q. Just drop it.

A. All right. Over the top of the bottle, the opening is sufficiently large.

Mr. Rogers: Q. I will ask you to notice the upper diameter as I gently nestle the collar down onto the shoulder of the bottle. I will ask you whether there is ever any change in that from this position into this position? Is there any change in the upper diameter?

A. No, there wasn't; it remains exactly the same.

Q. That is your position. Let's speak a moment about the upper perimeter of the collar. Is it at varying distances from the central axis of the body as it nests here in the way you have put [290] it on that bottle? A. I don't understand.

Q. Do you understand what I mean by an axis running vertically down through the center of the bottle?

A. Yes, that is the axis of the bottle.

Q. I will ask you to refer to the various points in the upper perimeter or periphery of the bottle collar, are they at varying distances from this central axis?

(Testimony of Harry S. Borden.)

A. Yes, they are, because when it gets down to the bottle collar, before it opens up it is farther down.

Q. This Connection, you say, is immovable, or not?

A. It is immovable. That is, it doesn't pivot. It can be moved, understand.

Q. When? A. But it doesn't pivot.

Q. What sort of movement is that?

A. Taking it apart or forcing it.

Q. Ordinarily, in normal operation it is immovable?

A. No, I wouldn't say that, because it can be moved. I wouldn't say anything was immovable that can be moved. It is not fastened down.

Q. Well, I mean in normal operation, normal installation at the dairy in its usual use it is immovable? A. No, it is not immovable.

Q. Will you explain, please, the movement which takes place there, if any?

A. Well, it would depend on the normal handling of the bottles in the crates, and being turned up on their sides and the wagon hitting bumps in the street, the bottles buckling up and the bottle collars being loosely on the neck of the bottles, it is bound to change its position somewhat.

Q. That changes the shape of the collars?

A. No, it doesn't change the shape. The shape remains exactly the same all the time. [291] The shape never changes. It is die-cut.

(Testimony of Harry S. Borden.)

Q. Does the whole collar move and the connection doesn't move?

A. Not having seen that happen, I couldn't say whether it did or did not. I would say it didn't move. I can't see any reason why it would move.

Q. All right. I am taking Exhibit 21, and I will ask you to lock that exhibit. Now, I understood you testified yesterday that that was a lock that did not pivot.

A. That is correct.

Q. You also testified that it does not permit enlargement of upper diameter?

A. Right.

Q. You testified that it was not immovable, and I will ask you to explain the movement, what movement can take place in that connection—and by "connection" I mean the connection between the ends of the collars.

A. It is not immovable, because it can be separated and taken apart and put together again.

Q. Aside from that movement the connection is immovable?

A. It can be forced, the same as on there, on the other collar.

Q. Can it be forced without mutilating it?

A. No.

Q. In ordinary use, with the collar on the bottle there is no movement?

A. The collar would remain the same, not the use.

Q. There is no movement in the connection in ordinary use?

(Testimony of Harry S. Borden.)

A. There is no movement in the lock, no, but it is not immovable.

Q. The only movement is that movement by which it is completely taken apart and unlocked, is that it?

A. Well, it can be partially unlocked and still get a movement.

Q. A movement when it is partially unlocked. Is there any change in the upper or lower diameter of the bottle collar, then?

A. When you partially open it you change the use of the collar entirely, because then it renders it unfit for use.

Q. Will you see that is locked in proper form? Will you drop it [292] over the bottle?

A. Yes.

Q. Now, I will ask you again, referring to the axis of this bottle, whether this upper diameter, or, rather, the upper perimeter is at varying distances from that axis.

A. The top of the upper section would be closer to the axis than the lower section, because the lower section, fitting on a wider portion of the flange of the neck, naturally makes it protrude further out from the axis of the bottle.

Q. This collar covers substantially all the bottle down to the body portion of the bottle?

A. Down to the shoulder of what we term the shoulder of the neck.

(Testimony of Harry S. Borden.)

Q. And it comes down substantially to the body portion, cylindrical portion?

A. It comes toward it, close to it.

Q. This collar also comes practically down to the neck? A. Yes, it does that, too.

Q. I mean that body portion. A. Yes.

Q. By "this collar" I mean Exhibit 3 I was referring to in the second instance. In Exhibit 4 am I folding this together right?

A. They come relatively close.

Q. Would you say all these exhibits, 3, 4, 5, 21—

A. Yes, I would say—

Q. And 22 all come substantially—

A. I would say all of ours fit well down on the shoulder of the bottle towards its body. I might explain the reason for that, too, that the reason it don't go higher on the neck is that in the milk business the milkman can keep the bottle in his hand without destroying it, mutilating it, removing the collar. It is for ease of handling.

Q. You mean he can grab the flange of the bottle?

A. Yes, that's correct. [293]

Q. The collar comes up on the bottle at the front of the bottle. Do you follow me? This genatrix of the collar is considerably longer at the front of the collar than at the back, or lower portion?

A. It is higher up on the bottle, yes.

Q. Why did you bring it up like that?

A. So it would fit over the neck of the bottle.

(Testimony of Harry S. Borden.)

Q. Well, it would fit over the neck of the bottle if you made it all of this height instead of having it substantially higher in front?

A. Not necessarily so.

Q. If we cut the collar, referring to Exhibit 3, off right around the top so that different elevations of the bottle were the same all around it would fit over the bottle all right, wouldn't it?

A. The best evidence of that is to do it.

Q. All right.

The Court: Oh, there is no doubt about it.

Mr. Rogers: On that assumption that there is no doubt about it, we will proceed. Why didn't you make it all of the height, the usual height of the front of the collar so it came around in the back so it would be the same height as the front, and that would give you much more advertising space.

A. It would give more advertising space, but it wouldn't secure the proper means to fit snugly over the end of the bottle.

Q. If it were large enough to go over the flange it wouldn't rest snugly on the shoulder or neck of the bottle? [294]

A. That's right.

Q. Therefore, by cutting the top of the collar sloping you have a top perimeter or periphery that is at least as large as the top flange of the bottle, isn't that correct?

A. Yes.

Q. Isn't that true of this collar, you had the sloping top edge there which enables it to have a larger upper perimeter, so as to be put on over—

(Testimony of Harry S. Borden.)

A. I don't know about this collar, because I didn't construct it, so I know nothing about it.

Q. The difference is in degree, you can tell by looking at it?

A. I know that it goes over the top of the bottle, I can see that.

Q. And that it is connected in the front and usually at the back? A. That's right.

Q. This last collar which is referred to and which for present purposes is marked Plaintiff's Exhibit 15—

Mr. Townsend: I object to that. It is not in evidence.

The Court: He is putting it in evidence.

Mr. Townsend: It has not been referred to in direct examination. It is nothing that we know about. It is not even one of the alleged—

Mr. Rogers: Mr. Townsend, if you will let me, maybe I can help the situation out. It has already been pleaded as Exhibit 15. I call your attention to the very request, what they requested us to set up on the collars that were adjudicated in the Cleveland suit. This is one collar that Judge Jones adjudicated infringed, and it already is in the suit by the Bill, as part of the Bill of Particulars. This is a duplicate of one of those. I am just formally noting it as being Exhibit 15.

Mr. Townsend: If you are going to put those exhibits in you should put all the exhibits in, the non-infringing ones as well.

(Testimony of Harry S. Borden.)

The Court: This may go in. [295]

(The device was marked "Plaintiff's Exhibit 13.")

Mr. Townsend: I think, your Honor, if he is putting in one that was in the Cleveland case he should put all those that were admitted not infringing.

The Court: If you want to do that—

Mr. Townsend: I haven't got them. They are in their possession.

Mr. Rogers: The tracings are all here, your Honor. If I can find them here I will be—

Mr. Townsend: I shall have to object, your Honor, to that last collar, at least the refusal to put in all of them into the suit.

Mr. Rogers: They are all in there. Here are the tracings that are in as Plaintiff's 13. Mr. Reporter, that last should be corrected; that last collar should have been Exhibit 13 and not 15, 13, 14, 15, and 16.

Mr. Townsend: Just a moment. Mr. Rogers, you don't mean to tell the Court that we have been furnished with samples of those collars?

Mr. Rogers: I say tracings have been put in.

The Court: Are they available?

Mr. Rogers: I will see if I can find them. I refer to collar heretofore identified as Plaintiff's Exhibit 15, rather a tracing of what was identified as Plaintiff's Exhibit 15 in Plaintiff's Bill of Partic-

(Testimony of Harry S. Borden.)

ulars, and I here introduce the original as Plaintiff's Exhibit 15.

(The collar was marked "Plaintiff's Exhibit 15.")

Mr. Rogers: I have also a collar which I offer as Plaintiff's Exhibit 14, a tracing of which appears under the same designation in Plaintiff's Bill of Particulars.

Mr. Townsend: Will you state to the Court that was held [296] not infringed?

Mr. Rogers: That was held not infringed.

(The collar was marked "Plaintiff's Exhibit 14.")

Mr. Townsend: You should say not infringed as to patent 1999.

Mr. Rogers: That will be all with this witness, your Honor.

Redirect Examination

Mr. Townsend: Q. In your cross-examination you called attention a number of times to the mutilation that these samples had undergone which made them fail to operate in the usual and the proper use. Just give us a word in regard to the permanency or lack of permanency of these collars; of this collar.

A. They are made up for a one-time handling, and one-time use, and that is all.

Q. Do you have any special paper for those?

A. We use what is termed as a bleach craft. It is what they call in the vernacular of the trade a meat wrapper. It is presumed to be impervious to

(Testimony of Harry S. Borden.)

water, retains its strength if it is wet and when it dries it retains its original weight.

Q. Is there any more pivotal action in your labels that are identified as Exhibits 3, 4, and 5 and your Exhibit, or your samples identified as Exhibits 21 and 22?

A. There is no pivotal action in any of them.

Q. One is just as unpivotal, as it were, as the others? A. Yes.

Mr. Townsend: That is all.

Recross Examination

Mr. Rogers: Q. One or two questions.

Mr. Townsend: There was just one more of these collars. Well, you finish your cross-examination.

Mr. Rogers: Q. What is the price of the paper that you use for these collars, f. o. b. San Francisco, for instance? [297]

A. I don't know this morning, because the prices have been changing every day for the last six months.

Q. What was the last price?

A. I don't recollect.

Mr. Townsend: That is not proper cross-examination and certainly not proper recross-examination.

Mr. Rogers: I am trying to find out what quality paper this is.

Mr. Townsend: This is an inquiry into a trade matter, what we might very properly term a trade secret.

(Testimony of Harry S. Borden.)

The Court: If he knows he may say.

The Witness: I will say the price we pay for that paper is a confidential matter between ourselves and the people from whom we buy, and I refuse to disclose it.

Mr. Rogers: Q. What would be the market price of the same paper?

A. I don't know what the market price is. It might be 7½ cents, and might be 8½ cents, or might be 9½ cents, or 12 cents a pound; I don't know.

Mr. Rogers: I want to be sure, your Honor, that we have un mutilated copies of various collars in this record for your consideration. One was referred to heretofore as being a duplicate of Exhibit——

The Court: Well, both sides can submit copies that have not been cut up at all.

Mr. Rogers: Yes, your Honor. I also want to make one point at this time, that is——

The Court: Well, let's get through with the witness before we go any further.

Mr. Rogers: Very well. I have finished with this witness.

Mr. Townsend: I forgot to ask a question about delivery from your shop to your customers. Are these things delivered [298] flat, or are they delivered nested?

A. They are delivered nested.

Q. You interlock them before they leave the shop?

A. Yes.

(Testimony of Harry S. Borden.)

The Court: The record discloses that already.

Mr. Townsend: That is all just now.

Mr. Rogers: That is all.

Mr. Townsend: There appears to be another paper here in that suit, your Exhibit 16, which was held not to infringe 1829 or 1999. Will you produce that as well?

Mr. Rogers: I assure you I have produced all I can find. I offer in evidence as Plaintiff's Exhibit 16 collar which was heretofore identified as Plaintiff's Exhibit 16 in Plaintiff's Bill of Particulars.

Mr. Townsend: It was held to not infringe 1829 and not infringe 1999.

Mr. Rogers: That's right.

(The collar was marked "Plaintiff's Exhibit 16.") [299]

IRVING C. ROEMER,

Called by Defendant; Sworn.

Mr. Townsend: Q. State your residence and occupation?

A. I reside in Oakland; I am a patent attorney in the employ of the firm of Townsend & Hackley. I have been in the employ of that firm and Mr. Townsend continuously for the past ten years.

Q. What has been your general duty in that employment?

(Testimony of Irving C. Roemer.)

A. I act as patent attorney, I have solicited patents before the United States Patent Office. My duties are to prepare and prosecute patent applications and to make a study of mechanical problems, physical problems.

Q. I suppose you have prosecuted a large number of patents through [302] to allowance and finality?

A. Yes, I have; it would be in the neighborhood of a thousand.

Q. Are you familiar with the patents in suit?

A. Yes, I have read all the patents in suit, and I have studied the file histories of these patents, and the art in connection with these patents.

Mr. Townsend: We have a chart here in evidence, Defendant's Exhibit A, showing the drawings of three several patents.

Q. I show you another chart, which I will ask be marked Defendant's Exhibit BB.

(The chart was marked "Defendant's Exhibit BB.")

Mr. Townsend: I ask you to just briefly tell the Court what that chart is intended to depict.

A. This chart represents the drawings as filed with the Wasser patents. The first illustration of the chart is the drawing of a Wasser Canadian patent. I think the application number was 293,378.

Q. No, that is the patent number.

A. Patent number. Issued on September 24, 1929.

(Testimony of Irving C. Roemer.)

Q. Just step down, if you would, and read——

A. This application was filed on December 17, 1928, and the drawing is the same drawing as used in a subsequently-filed patent application—no, an earlier-filed abandoned United States application, which was Serial No. 306,887, filed September 19, 1928.

Q. Are there any collars in evidence that would correspond to the drawing of this earlier Canadian patent?

A. I have never seen a collar made in the manner of this disclosure.

Q. What does the figure designated 5 represent on Fig. 1?

A. 5 is a slit in one end of the blank in which the collar is formed.

Q. What do the marks 6 and 8 represent on the other end? [303]

A. The little lines designated by the reference numerals 6 and 8 are slits in the edge of the blank which define a tongue designated by the reference numeral 9, and which tongue slides through the slit 5.

Q. Do you find that same structure depicted here in the drawings of the patents at issue?

A. Yes. That disclosure is identical with the patent to Wasser, 1,829,915, Fig. 1.

Q. Application—

A. Application filed December 14, 1930.

(Testimony of Irving C. Roemer.)

Q. The second drawing enlargement here of this chart, Exhibit BB, briefly explain to the Court what you have there.

A. These are the original drawings of the Wasser patent, No. 1,923,856 in suit, filed on January 14, 1929. Some of the figures of these drawings were subsequently cancelled, and the remaining disclosures, Figs. 1 and 2, are patent drawings as they are found in the patent.

Mr. Townsend: The two points the witness referred to, a certified copy of the drawings is in evidence as Defendant's Exhibit M, and the abandoned application to which the witness just referred is in evidence as Defendant's Exhibit N.

Q. I notice some red lines around certain of these figures.

A. All figures which were cancelled are marked below the red line. All the figures other than 1 and 2 were taken out of this application during the pendency in the Patent Office; they were then made a part of subsequently-filed applications.

Q. You are speaking of the abandoned application which was filed January 14, 1929?

A. Yes.

Q. That application appears as patent number—

A. 1,923,856.

Q. I understand the drawings on Figs. 1 and 2 of 1923 correspond to Figs. 1 and 2 of the abandoned application of January 14, 1929?

A. Yes. [304]

(Testimony of Irving C. Roemer.)

Mr. Kingsland: If the Court please, I do not like to object but it does seem to me that where all these matters are already before the Court that it adds nothing to have the witness describe details of this nature, because it is already in.

The Court: I need all the assistance I can get.

Mr. Kingsland: Yes. If that be true, of course, we do not want to object.

The Court: I will allow it.

Mr. Kingsland: It did seem to me it was all before the Court.

The Court: It is, but it is being cleared up.

Mr. Townsend: Q. In regard to the third and fourth sheets—strike that out. Still referring to the second sheet on Exhibit BB, with the figures 3, 4, 5, 6, 7 and 8 circumscribed by the red lines, I understand those were stricken from that patent, or from that application for the patent as finally issued as 1923, is that what you have explained?

A. Yes.

Q. What became of the stricken figures?

A. Those are placed in another application, some of those figures are found in the original drawings, as filed, of the Wasser patent No. 1,829,915. Application for that patent was filed December 18, 1930.

Q. We have here as Exhibit A these drawings that you refer to in 1829. What is the third sheet of drawings on Exhibit BB that bears the number

(Testimony of Irving C. Roemer.)

503,143? Suppose you take the third and fourth sheets together.

A. Those are the drawings of Wasser patent 1,829,915, application filed December 18, 1930.

Q. Then certain figures that are embraced in red lines—

A. Those were cancelled on this application.

Q. What became of them?

A. They were subsequently placed in another application.

Q. Which eventuated as what?

A. As the patent to Wasser, [305] 1,999,011, in suit, application filed August 17, 1933.

Q. Is there any further comment you want to make on these drawings or the file wrapper?

A. I think not, because the several views of the drawings are so nearly identical that you can see them clearly, where they have been taken from one application and placed in the other.

Q. Now, perhaps you can briefly show the Court from this chart Exhibit A of the four you have on on here the particular features that are covered by each of those patents.

A. In the patent 1,923,856, this patent relates to a bottle collar or display device. The specification of the patent describes a paper blank so formed that it may be bent up into a collar-like form, and also describes a means for connecting together the ends of the paper blank to hold it in its collar-like form. Some emphasis is placed on the particular

(Testimony of Irving C. Roemer.)

means used, that is, the form of paper that is used. This is the little slot and tongue, and the claim of this patent is directed to the particular type of lock that is used, and especially to the shape, the specific shape of the tongue that is used in connection with the slot to hold it in its frustro-conical shape.

Q. Do you recall what is said in regard to the curvature, the locking edges being on the same radii?

A. In regard to the shape of the paper blank, the patent says that the lower edge designated by the reference numeral 2 and the upper edge designated by the reference numeral 3 are struck on the same arc, or on an arc of the same radius. In other words, in using a compass to draw this it is not necessary to move the compass at all. One line is drawn, and then the other line is drawn with the compass set for the same diameter. The result of that is you get a shape wider in the center than it is at the ends. [306]

Q. Is that the meaning of this part of the description where it reads "A display device comprising a flat section of pliable material having its upper and lower edges curving on radii of the same length"?

Mr. Rogers: You are reading from where, Mr. Townsend?

Mr. Townsend: I am reading the claim, the first four lines. I am not asking him to interpret the claim, I am asking him to define the designation in

(Testimony of Irving C. Roemer.)

the specification of the element that is called for.

Mr. Rogers: That is a nice distinction. What is the difference between interpreting the claim and saying what it is?

Mr. Townsend: The question is perfectly proper.

The Court: He said he can't see any distinction between the two. You are not asking him to interpret the claim, are you?

Mr. Townsend: I am not asking him to interpret the claim.

The Court: What are you doing?

Mr. Townsend: I am asking him to find the element, if there is an element to correspond to that.

The Court: He may answer.

Mr. Townsend: Q. Does that help you, because you have to do that part of the mechanics of the case.

The Witness: The answer to the question is Yes. The same radii referred to is the radius used in swinging the arc 2 on drawing Fig. 1, and in swinging the arc 3.

Q. Now, we will take the defendant's labels. You are familiar with the defendant's labels, are you? A. Yes.

Q. Those particularly that you find here on the chart Exhibit I? A. Yes.

Q. Does this Exhibit 4 correspond to a label that is marked No. 4 on the chart Exhibit I?

A. Yes. [307]

Q. Speaking of outlines, not of printing.

(Testimony of Irving C. Roemer.)

A. Yes, they are identical in shape.

Q. That, as I say, has been alleged to infringe what claim of 1923. I will ask you if that Exhibit 4 possesses upper and lower edges curved on radii of the same length.

A. No, it does not. As a matter of fact, the upper and lower edges are not arcuate; neither the upper nor the lower edge is arcuate. They are designs of special shape, I believe, for the purpose of displaying certain advertising matter, but neither of them are arcuate and neither of them are formed according to any radius.

Mr. Townsend: It is perfectly obvious to your Honor he is comparing the chart, the Exhibit 4 with Fig. 1 of 1923.

Q. Point out to the Court if you find on the drawing of patent 1923 "a tongue projecting angularly from the opposite end of said section and having approximately parallel side edges, and being adapted to be inserted and withdrawn through said slit."

A. The tongue to which you refer is the tongue 5 in the Wasser patent 1,923,856, and the parallel edges are the edges 6 and 8 which when the device is assembled slide through the slit 4 at the opposite end of the collar blank.

Q. Look at Exhibit 4, which it has been alleged infringes the claim of that patent, 1923, and state whether or not you find an element with a tongue with approximate parallel side edges?

(Testimony of Irving C. Roemer.)

A. The part of this collar that would be compared with the tongue would be on this pointed end, and there are no parallel edges on it. It only has two sides and inserted through the slot. Those sides converge.

Q. Now, that we will not be considered technical in these matters, will you tell the Court what references were encountered by the plaintiff when he was endeavoring to get his patent? [308]

A. The patents cited as references against the Wasser patent 1,923,856 during the pendency of the application were the patents to Knowlton, 53,836, April 10, 1866; patent to Spellman, No. 1,309,263, July 8, 1919, and Patent to Wasser, 1,829,915, November 3, 1931; also the Swiss patent to Huber, 110,722, of July 1, 1925, and a British patent to Brown, 13,360, of July 1, 1901.

Mr. Townsend: All those patents, your Honor, are in evidence. [309]

Mr. Townsend: We had just finished considering the first patent, No. 1923, and now we will take up the second patent of Wasser, 1829. I will ask you first, will you indicate the prior art references, if any, that were cited during the pendency of that case?

A. The patents cited as prior art against patent No. 1,829,915 were the patent to Spellman, 1,309,263, July 8, 1919; patent to Wood, 1,793,348, February 17, 1931, and the foreign patents, the British patent to Brown, 13,360, of July 1, 1901, and the Swiss

(Testimony of Irving C. Roemer.)

patent to Huber, 110,822, July 1, 1925.

Q. Those patents, likewise, are in the prior art book in evidence? A. Yes.

Q. Now, briefly refer to the alleged novel features of this Wasser patent 1829.

A. The Wasser patent 1829, like the one previously referred to, is directed to a bottle collar, and the novel features, like the first patent, pertain to means for fastening together the ends of the blank which hold the blank in a collar-like form.

The Court: The tongue?

A. Cuff-like form. Particularly among the novelties of the patent is the tongue and the slit.

Mr. Townsend: Q. You mean the asserted novelty?

A. Yes: the tongue and the slit of this patent differ slightly from that of the first patent. If I can refer to this patent, the point which is brought out in patent No. 1829 is that after the tongue and slit are put together they retain the blank in a conical shape in such a manner that it may be folded at its point of [310] connection, and further enlargement of the upper, or smaller end, of the cone-like collar. There are two ways in which that is accomplished, as shown by this particular patent. One is that way shown in Figs. 1, 2, and 3, in which there is a slit 9 in one end of the blank and slit 10 and 12 in the opposite end of the blank, which go to form a sort of hook-shaped tongue 13. That is the

(Testimony of Irving C. Roemer.)

tongue extending downwardly. When the blank is folded into position that forms a sort of hook, which hook interlocks with the slit as shown in Fig. 3. That permits a pivotal movement at that point of connection to the effect that the upper end might be enlarged. The other way of pivoting to permit enlargement of the upper end of the cone-like structure is shown in Figs. 4 and 5. This is a different modification of the invention, and really different form of the invention, where the slit at the one end is formed with angular portions, or, in other words, instead of the slit being a straight line it is on an angle, an angular slit. It has a straight portion 17, angular portion 18, which recedes here. The opposite end of the blank, as it has been referred to, has a fishtail tongue, in other words a tongue that has that hook effect at both ends, so when it is fastened—

Q. Both sides, you mean?

A. Both sides of the tongue, so when the tongue is fastened through the slit 17 both sides of the tongue engage with that slit. Pivotal motion is permitted by the little ends 18 with the slit 17. It is the angularity of the slit in this case which permits the pivotal motion referred to, and this pivotal motion is described in the patent as being for the purpose of permitting an enlargement of the upper end of the cone or collar.

Q. You referred, in regard to Fig. 1, that the hook-shaped position [311] was formed by the

(Testimony of Irving C. Roemer.)

structures 10 and 12, is that right? A. Yes.

Q. It is correct, is it not, that 6, 10 and 12 are at right angles to one another? A. Yes.

Q. Were they to correspond with tongue 5 of the first patent, 1923?

A. There is a difference in detail, but in the tongue 5 we still have a hook-shaped tongue.

Q. You would say, then, there are two ways in which you can form the tongue and slot relative to one another, in which to get pivotal action, one representation is patent 1829, where you have the angular slit represented by the fishtail tongue?

A. Yes.

Q. And then you said the alternative if you are using straight slits is to have that hook-shaped tongue. A. Yes.

Q. Like 5 of 1923? A. Yes.

Mr. Townsend: Is that clear to your Honor?

The Court: Yes.

Mr. Townsend: Q. Referring now to 1829, will you indicate the arcuate piece of pliable material, the designation?

A. The arcuate piece of pliable material is that member shown at 1 in Fig. 1 of the patent, and that member shown at 14 in Fig. 4 of the patent.

Q. Will you take Exhibit 25, if you find it there on the desk, and show in what way you secure a lower diameter of that device approximately equal to the diameter of the body portion of the bottle?

A. I have Exhibit 25 here. It is said in one of

(Testimony of Irving C. Roemer.)

the patents that the lower diameter of this collar is approximately equal to the diameter of the body portion of the bottle. That simply means, of course, that the thing is the proper size to fit on a bottle. If they were intended to fit up higher on the bottle they would be a different size. If it were to fit down lower on the bottle it would be larger. [312]

Q. In regard to the shape of Exhibit 25, when that rests on a flat surface is the axis of Exhibit 25 in cone shape there substantially perpendicular to the plane surface on which the collar rests?

A. Yes. This exhibit is a little out of shape, but, according to the patent, the lower edge of this should be on a plane, so it rests perfectly on a flat display.

Q. If you are to take one of the large collars, say Exhibit 3—tell us what the situation is there.

A. Exhibit 3 is not so clear. It has a bottom edge which extends downward farther at some points than it does at other points when properly set up; it rocks when placed on a flat surface.

Q. Take Exhibit 4.

A. The same is true of Exhibit 4.

Q. Just lay that down there. Indicate, speaking in the terms that I have read to you about the equal diameter, the defendant's collars are cut, would you say, on a bias so the axis of the cone when the cone is laid upon a flat surface would be very much of an incline to the flat surface on which the cone rests, whereas in the plaintiff's device you would have un-

(Testimony of Irving C. Roemer.)

der similar circumstances the axis substantially vertical to the plane on which the surface rests, or collar rests? A. That is true.

Q. Is that what that difference, is that the distinction that is meant by those terms that I have read to you? A. I would like to have the—

Q. The lower diameter approximately equal to the diameter of the body portion of the bottle?

A. Just that much means that the bottom of this is approximately the same diameter as the bottle is at its largest diameter or body portion. We don't have the diameter measurable in the same sense on a cone that has an uneven bottom.

Q. Describe, in connection with Exhibit 25, where you get the means [313] for connecting the ends to permit the enlargement of the upper diameter of the member? I understood you to say that it is due to the angular slot 17 of patent 1829.

A. Do you wish me to describe—

Q. Well, you have—

A. That action in connection with—

Q. Very well. A. With Exhibit 25?

Q. Yes.

A. In Exhibit 25 there is an angular slot which is similar in some respects to the slot of patent No. 1829915, the principal difference being that in the patent there is an angular extension on both ends of the slot and on Exhibit 25 there is an angular extension on one end of the slot. The normal position of the bottle collar when the tongue has

(Testimony of Irving C. Roemer.)

been inserted through the slot is as I demonstrated, without the end extending into the angular portion of the slot. If we pivot that, that is, pivot it about the point where the pivot of the slot terminates, that is the upper end of the slot, if we pivot it to that point the opposite end of the bottle collar rocks into the angular extension; that angular extension receives it and permits that pivotal motion, and that pivotal motion permits enlargement of the upper end of the collar slightly.

Q. That description you have given, is it correct to say that the patent means that when it says "the relative shape of the notch and tab permitting a swinging motion between the respective ends when joined so as to permit an enlargement of the diameter on the small end of the cone."

A. That is exactly what the patent is speaking about.

Q. Similarly, where it refers to pivotal connection it is in such a way as that?

A. Yes, that is the pivotal connection.

Q. Referring to Defendant's collars there, 3, 4, 5, 21, and 22, what do you find? You don't need to go into any great length if [314] it is clear to the Judge, just summarize it briefly.

A. Taking Exhibit 5, that same swinging movement is impossible. This is the normal position of the collar. With the slit applied, or the tab that extends into the tongue, it is impossible to pivot that. In fact, that would permit enlargement of

(Testimony of Irving C. Roemer.)

the pivot. It will swing the other way, but there is no occasion to swing it the other way. That is the way the device is placed together. Once it gets to the normal position of rest there is no pivotal movement, because this end portion engages against the bottom of the slit and positively prohibits any pivotal movement.

Q. In other words, the two ends of the slit form stops—

The Court: Would you say that was the normal position? A. That is the normal position, yes.

Mr. Townsend: That is clear, your Honor?

The Court: Yes.

Mr. Townsend: Q. Now, turn to the third patent, 1999, and just tell what the references were there that were cited.

A. The references cited against patent 1,999,011 were the patent to Spellman, 1,309,263, of July 8, 1919; the patent to Wasser, 1,829,915, of November 3, 1931, and the patent to Wasser, 1,923,856, of August 22, 1933, the patent to Knowlton, 53,830, April 10, 1866; the patent to Stranders, 1,054,252, February 25, 1913, and the foreign patents, Swiss patent to Huber, 110,722, July 1, 1925, and British patent to Brown, 13,360, July 1, 1901.

Q. I think it is understood this third patent, 1999, refers to a strip of material that has its ends permanently fastened together.

A. That is correct. The strip of material is a blank, you might call it, the same as the blank in the other two patents that I have discussed.

(Testimony of Irving C. Roemer.)

Q. With what exception?

A. It does not have a tongue and slit. [315] It is obvious it is to be permanently or immovably secured together by glue, or stitching, or some permanent means.

Q. It appears in Fig. 1, I believe, of this patent 1,999, it has neither tongue nor slot?

A. Correct.

Q. So will you explain to the Court the means of connecting those ends?

A. Several means are referred to and disclosed in the patent. In Fig. 2, where the collar is shown in place on the milk bottle, the ends are glued together. In Fig. 3 the ends are stitched together, I suppose, by regular sewing machine stitching. That is the way it is referred to in the patent. In Fig. 4 they are fastened together by a little metal clasp by the means that are usually, or commonly used to punch paper, copies of letters and office correspondence. Fig. 8, the ends are fastened together by being interfolded one with the other, and glued or otherwise secured, so that they are permanently fastened, and in Fig. 9 they are fastened together by what is sometimes referred to as punching through, by upsetting the paper, two pieces of paper, laying one over the other, and they are broken by a simple machine and the parts are forced through. It is also a common expedient, commonly used in offices for connecting together loose papers.

(Testimony of Irving C. Roemer.)

Q. Where these strips are connected together by the means you have described, staples, sewing, glue or double seaming, would you call that immovable? Is that what you understand, and is understood by the term "immovably connected"?

A. Yes, those are immovable connections as described by the patent, and the patent discusses that in some detail, the different ways of doing it, and points out it is unnecessary by these means to form any slit which weakens the paper, or anything of that sort.

Q. What would happen to the device, or any of these devices of [316] patent 1999 that are so immovably connected together if you broke that connection?

A. The device would be destroyed.

Q. Will you just take the defendant's structures which are Exhibits 21 and 22, and 5 and 6 on this chart Exhibit I, in which they allege that infringe claim 3 of 1999, and I will ask you if those exhibits, 21 and 22, are immovably connected together?

A. No, they are not so connected together. I have Exhibit 22 in my hand. It is a flat blank with its end connected, or they may be connected together by a form of paper lock, and it is not immovable, because it is formed so that it may be as easily taken apart as it is put together.

Q. If you took it apart could you reassemble it?

A. Yes. This particular model has apparently been taken apart and reassembled about fifty times, and it is still capable of functioning properly.

Q. Referring to 21 and 22, defendant's devices, state whether or not the lower perimeter of those, or either of them, have their lower edge concentric with a longitudinal axis of the bottle so they will be located at different distances from the axis.

A. Will you just repeat that?

(Question read by the reporter.)

Mr. Townsend: Q. Will you just stop the question with "longitudinal axis of the bottle," so the question would be then "Do those devices of the defendant possess a lower edge which is concentric with the longitudinal axis of the bottle"?

A. They do not. I would like to explain that, because I think that the terminology of the patent is a little bit confusing. Longitudinal axis of the bottle may be too general; as a line that runs directly through the center of the bottle in a vertical direction as the bottle stands in its normal position. If we draw a perfect circle around the outside of this bottle any [317] place on a horizontal plane, any point on that circle would be exactly the same distance from that center line as any other point. That is concentric. Any circle is concentric to the center; therefore, if you place a collar like this collar, which is Exhibit 25, around this bottle, and the lower edge of this collar is exactly on a horizontal plane, it is concentric with the center, with the axis at the bottom. If we tip this collar this way it is no longer concentric, or this way. It is impossible for collars formed in the manner of Exhibits 21 and 22 to have the bottom edge concentric with the longi-

(Testimony of Irving C. Roemer.)

tudinal axis of the bottle, because it is impossible to place those collars on there in such a manner that their bottom edge is on a horizontal plane. In their normal position on the bottle their bottom edge slants somewhat; not only does it slant, but it has an irregular contour, so that the question of concentricity is not conceivable in connection with the bottle collar designed in the manner of these collars.

Q. I show you a collar of defendant's which—I mean of plaintiff's which was identified by Mr. Neher as being one of their collars, it is marked "Defendant's Exhibit C," I call your attention to three patent numbers that appear at the end. They appear to be the numbers of the three patents in suit.

A. That is correct.

Q. Just show this to the Court as I ask the next question; does that device that you have before you, Exhibit C, have a hook with edges that are parallel to each other?

A. I assume you refer to the tongue.

Q. The tongue, or hook.

A. There are no parallel edges on the tongue of this device. The tongue is an arcuate shaped tongue that might be referred to as a half circle. [318]

Q. It is what we call the fishtail variety, in circular form?

A. Yes, it is one of the fishtail tongues.

Q. That is obviously distinguishable from the member we saw in patent 1923?

A. Yes.

Q. Now, in regard to the pivotal action. Under

(Testimony of Irving C. Roemer.)

1829 you have already explained that, have you not, that is given by the angular slit? A. Yes.

Q. Now, in regard to Wasser patent 1999 of the immovable connection will you say that that exhibit, the plaintiff's device has an immovable connection?

A. I should say very definitely that it does not have. It does have what one of the patents refers to as a pivotal connection. It is not immovable in that sense of the word, and it is not immovable in the sense of the word that after the connection has been made it may be taken apart again.

Q. In regard to the prior art, have you studied the prior art? A. Yes.

Q. And you are familiar with it? A. Yes.

Q. Now, will you take, for example, the first Wasser patent 1923, and if you will lay before the Judge, there, the patents that you consider most applicable to that patent?

A. I have arranged those in a book which has been handed to the Court.

Q. I anticipated a little in my question. Have you arranged in that same book some prior patents which could be and which will be illustrative of the state of the art with respect to paper article connections by hooks, tongues and slots? A. Yes.

Q. Will you indicate where that occurs in the volume that the Court has, or you have there?

A. Tongues and slits or, in other words, locks, paper locks are shown in the last division [319] in this volume, after the last blue divider.

(Testimony of Irving C. Roemer.)

Q. Will you just briefly describe or read those particular patents off? Just read those over so counsel can get those as we go along. Just read off those patents in that classification that you have.

A. The first patent is the patent to Reynard, 871,767.

Q. That is Exhibit R-23.

A. Yes. Second is the patent——

Q. To save time, have you a chart in which the drawings of patents have been assembled so as to bring into quick view all these patents together?

A. Yes, the drawings of these patents have been pasted on a sheet where they will be more easily referred to.

Q. As you go along, just read them off, so counsel will know what they are.

A. Patent to Reynard, 871,767.

Q. Exhibit R-23.

A. Patent to Hirsch, 756,019, Exhibit R-24.

Mr. Kingsland: Mr. Townsend, if you want to refer to them it won't be necessary for you to tabulate them. I will be able to locate them.

Mr. Townsend: If it will help you, I have these——

Mr. Kingsland: No.

Mr. Townsend: You can use my copy.

Mr. Kingsland: This is off the record.

(Discussion off the record.)

Mr. Townsend: Q. Those patents on that chart are illustrative of what?

(Testimony of Irving C. Roemer.)

A. They are illustrative of locks, paper locks. These patents relate to various types of paper or pasteboard articles, how they can be fastened together with tongue and slit types of connections by the means that are used in fastening together the bottle collars of these patents in suit, and they are simply illustrative of a few days in which that has been done.

Mr. Townsend: I will offer this chart and ask it be marked [320] Defendant's Exhibit CC.

(The chart was marked "Defendant's Exhibit CC.")

Mr. Townsend: Q. Now, have you a similar group of patents in regard to what we have designated as art showing bottle collars? A. Yes.

Mr. Townsend: I am going to ask that this chart be marked Exhibit DD.

(The chart was marked "Defendant's Exhibit DD.")

The Witness: This group of patents is next to the last subdivision in the book that has been handed to the Court.

The Court: What is that illustrative of?

A. These are patents illustrating various forms of bottle collars, any type of device put around the neck of a bottle used for advertising purposes. The first patent I refer to is Nuhn and Kuehne, a little metallic clasp that is put around the neck of the bottle to tell what the contents of the bottle are.

The next patent is to Huber, that is the Swiss

(Testimony of Irving C. Roemer.)

patent No. 110,772, and shows the bottle collar structure which functionally is almost identical with the structure of, or one of the defendant's bottle collars that has overlapping ends. It does have a pivotal connection which would permit enlargement of the top that defendant's bottle collar does not have. The translation of this Swiss patent describes this as a drop catcher; also as a device bearing advertising matter around the neck of the bottle. It is designed for a drop catcher, to catch the drop that runs down the bottle.

Another form of drop catcher is shown in patent to Faulhaber, No. 1,683,176. That is one that you might say is immovably connected, because it does not have connecting means. It is formed as a single piece, and simply drops over the neck of the bottle.

[321]

Mr. Townsend: Q. In regard to the last two patents mentioned, you referred to some similarity between particularly the Swiss patent and one of the defendant's devices. Will you indicate which one you are referring to?

A. Well, the Swiss patent fastens together with a little metallic clip or eyelet of the nature of that used in Defendant's Exhibit V. I also refer to defendant's structure——

Q. Plaintiff's Exhibit 5.

A. Plaintiff's Exhibit 5. The device used in the Swiss patent has its ends overlapping in this fashion. That is the manner in which this bottle

(Testimony of Irving C. Roemer.)

collar is used. You will note that many of the other bottle collars are formed in this manner, brought around just as a plain collar, and in Defendant's Exhibit 5 and in the Swiss patent the collar is formed, the bottle collar is formed by wrapping a piece of paper around the bottle somewhat at a slant, so one end overlaps the other in the manner to make them cross each other.

Q. Will you show it?

A. That scarf-like wrap is typified in the patent to Shaw, which is also on this patent. There is another patent in which the ends are crossed and brought together when they are fastened, the patent to Piatt, No. 1,473,313, and the patent to Heard, 1,353,531, are simply illustrative of other types of bottle collars adapted to fit around the neck of a milk bottle for the advertising problem.

Q. Now, turn to the first Wasser patent, 1923. Have you arranged the art that would correspond, in your mind, to that—I will ask that this chart be marked Defendant's Exhibit EE.

(The chart was marked "Defendant's Exhibit EE.")

A. This chart that I have with the drawings of the Wasser patent and the drawings of a few patents of the prior art which show connections, show slots and tongues which are of the same order [322] as that used in the Wasser patent, and as that claimed. The patent to Swope, for example, No. 228,002—this, incidentally, was patented in May,

(Testimony of Irving C. Roemer.)

May 25, 1880—it shows a bottle wrapper, also a collar-like device, a flat blank that is wound up in a cylindrical form, held in its cylindrical form by ends which are connected together by a slit and a tongue, and the tongue appears upside down in respect to the manner in which it is shown in the Wasser patent, but the tongue is of the same order with the parallel sides referred to in the Wasser patent. It has a hook-like tongue which goes over the slit, goes through the slit. The same tongue modified with round edges, a hook-like tongue is shown in the patent to Guardino, 1,300,164, and similar tongues are shown in the patent to Klein, 704,549, Cheney, 716,668, Gridley, 63,629; that is a patent issued in 1867. These tongues do not all have parallel edges exactly as the Wasser patent, but the Swope patent, the structure and function of the device is identical with that of the Wasser patent, a little bit of difference in the proportions, but that is all. The patent to Spellman, which is for a lamp shade, patent No. 1,309,263, shows the tongue and slit, in this case the tongue happens to be of the fishtail type, two ends which engage when it is inserted through the slit.

Q. You refer to patent to Spellman for lamp shade. I want to again call your Honor's attention to the license, Exhibit L, and ask if the Court would just kindly observe what the device is called in the several patents; that is a milk bottle lamp shade.

The Court: I will accept your statement on that.

(Testimony of Irving C. Roemer.)

Mr. Townsend: Yes. With that in mind, have we in evidence here a specimen, or can you produce a specimen which would correspond to the so-called lamp shade patent to Spellman? [323]

A. Yes. One of the defendant's structures is very similar in shape——

Mr. Kingsland: If they are referring to a structure that is out of the case I think it is utterly immaterial to go into that. That was the one, your Honor will recall, that was out of the case.

Mr. Townsend: I agreed to connect it up or it would go out.

The Court: All right. I will put it out without your connecting it. It was not a part of the Bill of—so far as the pleadings are concerned it was not in.

Mr. Townsend: I understood, your Honor, yesterday that it was identified as a structure, one structure, one of the actual structures used by the defendant, and we said we would show its connection with the prior art.

The Court: I will give you a record on it, but it is my own thought we should confine ourselves to the issues.

Mr. Townsend: Well, suppose we refer to another piece of paper, another exhibit, so I won't be misunderstood. Have you a model——

Mr. Rogers: This looks like the same thing.

Mr. Townsend: I am going to illustrate the prior art.

(Testimony of Irving C. Roemer.)

Mr. Rogers: Is it your contention this is in the prior art?

Mr. Townsend: The Spellman patent is in the prior art.

Q. I am asking whether you may construct a model which would, in your opinion, correspond to the Spellman patent.

Mr. Rogers: Your model has been made long after the patent, has it?

Mr. Townsend: Yes. All models of prior art patents have to be constructed, as a rule, more recently than the date of the patent. It is a question of correctness.

A. The article handed to me is a bottle collar and when it is [324] folded-up position it assumes very much the shape of a lamp shade, and has very much the appearance of the article shown in the Spellman patent. That is true even as to detail. It is made of an arcuate blank similar to that of the Spellman patent, but it has a tongue and a centrally-located slit through which the tongue is inserted to hold it in its cone-like shape, and the exact shape of the device will depend upon the bottle to which it is to be applied. It might assume the form of a lamp shade of any other proportion, depending upon the bottle it is designed to fit.

Q. Will you just mark this with the name "Spellman" and the number of the patent?

Mr. Kingsland: If the Court please, I don't think that really is a fair examination. What coun-

(Testimony of Irving C. Roemer.)

sel has done, he has taken this bottle collar and tried to use that as an illustration of something that he has already got in the prior art. The statement of the witness was this had been made sometime within the last six months or less.

The Court: You would not go so far as to say it was made for the purpose of this case, would you?

Mr. Kingsland: I wouldn't know. I don't believe it was.

The Court: It is remote. I will let him have a record on it.

Mr. Townsend: I offer this as Exhibit FF.

(The model was marked "Defendant's Exhibit FF.")

Mr. Townsend: Q. Have you a model, for instance, of the Guardino blank that is shown in Fig. 4 of Guardino patent 1,300,164, April 8, 1919? Will you explain that and show it to the Court?

A. This piece of paper is a blank cut to represent the blank illustrated in the Guardino patent, and it has a slit at one end and a connecting tongue at the other [325] end, so when it is placed together it forms a collar-like device. The patent is directed to a container and the bottom of the container has been left in place here to illustrate its position as shown in the patent, but this little paper model cut according to the teaching of the Guardino patent shows a collar-like member, and, as a matter of fact, a collar can be formed of it under the teaching of this patent.

(Testimony of Irving C. Roemer.)

Q. Has that model that you just dropped over the bottle undergone any change other than size?

A. No; it has been enlarged to fit a milk bottle. Of course, the one in the patent has been reduced to fit the paper.

Mr. Townsend: I offer this model.

The Witness: I might say it has been decorated by printing to make it appear as the bottle collar would appear.

Mr. Townsend: I ask that that be marked as Defendant's Exhibit GG.

Mr. Kingsland: If the Court please, the offer in evidence of that model is objected to as not having any foundation; it does not follow the patent, the Guardino patent. It has been changed, as the witness admits.

The Court: Why did you change it?

The Witness: I don't recall having said it had been changed, except that it has been——

The Court: It has been enlarged.

A. No doubt the one in the patent has been reduced for the purpose of illustration.

The Court: Yes. He said the one in the patent has been reduced.

A. Yes, for my purpose.

The Court: It has to do with the type of structure.

Mr. Townsend: You can show if there are any variations by [326] cross-examination.

(The model was marked "Defendant's Exhibit GG.")

(Testimony of Irving C. Roemer.)

Q. Will you indicate to the Court the purpose of lead lines that appear on the chart Exhibit EE? Take, for instance, the Swope patent.

A. Yes. The lines that have been drawn on here with the double-headed arrows indicate the similarity between——

The Court: You have already so testified, have you not? A. I don't recall.

Mr. Townsend: Q. Did you call attention, I may have missed this, Judge, did you call attention to the particular shape of the hook? A. Yes.

Q. Then I will pass on to something else. In regard to Wasser patent 1829, the No. 2 patent, a chart similarly prepared, which I ask be marked as Exhibit HH.

(The chart was marked "Defendant's Exhibit HH.")

Mr. Townsend: Q. State whether or not that chart corresponds with the drawings of the patent on here, and assembled in the book of prior art patents to Wasser.

A. Yes, it does, and on this chart, as in the last one to which I referred, the parts of the prior art patents which are similar to the elements of the Wasser patent are indicated by arrows.

The Court: Similarity?

A. The similarity is brought out by arrows.

Mr. Townsend: Q. Have you any representation of the Taylor patent as it might appear if used as a bottle collar; the Taylor patent No. 343,866, June 15, 1886?

(Testimony of Irving C. Roemer.)

A. Yes. This model which I have in my hands is a bottle collar made according to the teaching of the Taylor patent for a paper box; in other words, the slot of the Taylor patent and the tongue of the Taylor patent have been formed as a bottle collar.

Q. On the correctness of design, what have you to say? [327]

A. The collar, in so far as the slit and the tongue go is a copy of the Taylor patent. As to arcuate strip, it is not the same as that in the Taylor patent. This has been formed into a frustro-conical shape of a little bit different proportion than the Taylor patent.

Q. The cone has been slightly accentuated?

A. Yes.

Q. And the size is larger than that?

A. Yes.

Mr. Townsend: We have an application of the old doctrine, the mere change of form in degree does not vary the essence of the invention. I will ask that be marked and received as II, and if there have been any omissions I believe it is HH, and I ask that be received, that chart.

(The model was marked "Defendant's Exhibit II.")

Mr. Kingsland: I will object to that, that it is obviously not following the disclosure of the patent; that is for an entirely different purpose.

(Testimony of Irving C. Roemer.)

The Court: Well, there are some portions of it indicated by the arrows—

The Witness: Yes. That little model indicates the application of the tongue and slit of the Taylor patent to a bottle collar.

Mr. Kingsland: And nothing more than that?

The Court: Nothing more?

A. That is correct.

Mr. Townsend: Now in regard to the Goes patent, have you a sample of that? The next patent is No. 1,480,661.

A. That Goes patent, That also shows a slot and tongue, and this model which I hold in my hand is used as the slot and tongue of the Goes patent to show how they would serve to form a bottle collar.

The Court: Put that on the bottle. What year was that? [328]

A. That is a patent of June 15, 1924, patent No. 1,480,681, to Goes.

Mr. Townsend: I ask this Goes model be received in evidence as Exhibit JJ.

Mr. Rogers: We make the same objection to this, because it obviously is not prepared in accordance with the Goes patent, and, therefore, is no representation of the Goes patent.

The Court: What similarity is there?

A. It has the tongue and slot copied from the tongue and slot shown in the Goes patent.

Mr. Rogers: There is no attempt to use this model as the representative of the Goes patent?

The Witness: Are you examining me now?

(Testimony of Irving C. Roemer.)

The Court: You may answer.

Mr. Rogers: Well, you made the statement.

A. That is all; that is the only claim I have made, yes.

(The model was marked "Defendant's Exhibit JJ.")

Mr. Townsend: Q. In connection with the first chart Exhibit EE, I meant to ask you if you have a model corresponding to any other device on there.

A. This model is made in accordance with the teaching of the patent to Gridley, 63,629, of April 29, 1867. The Gridley patent shows a tongue and slot, showing the manner in which it can be applied to a collar. I might explain, your Honor, that in all these hook type tongues there is a pivotal connection, in almost any tongue and slit connection there is a certain amount of looseness, it is not intended to be a very firm type of connection, but in the hook type there is always freedom for pivotal movement.

The Court: What year was that?

A. That was in 1867.

The Court: What similarity is there in this one?

A. This model shows the tongue and slot of the Guardino patent applied to a bottle collar. [329]

The Court: That is the purpose of the offer; it is limited to that?

Mr. Townsend: Well, it is limited as to complete anticipation.

The Court: That is an argument.

(Testimony of Irving C. Roemer.)

Mr. Townsend: No. I don't want to appear that the offer is limited to any particular thing.

The Court: If I follow the testimony, your expert says the last one was limited to what?

The Witness: I did not intend to impose any limitation on it as a matter of law, your Honor. I simply said that I had used the tongue and slit of the patent.

The Court: Counsel asked that and I tried to have you limit the offer.

The Witness: That was the only claim I made, that the tongue and slit shown in the patent had been used.

The Court: On that? A. Yes.

The Court: Beyond that—

A. Beyond that nothing other than this obviously—

The Court: All right. Is that true of this one or not?

A. It is the same with this particular tongue and slit that was used in the patent, the tongue and slit are used at opposite ends of an arcuate strip of paper, and as he said.

Mr. Townsend: An arcuate piece in arcuate form; don't forget that, your Honor. A change in form in proportionate degree does not make any difference.

The Court: Let's not argue any further, for we are not making any headway here. Proceed.

(Testimony of Irving C. Roemer.)

Mr. Townsend: I want to show these articles are conical.

Mr. Kingsland: We object on the ground that it is an improper representation of the Gridley patent.

[330]

The Court: It goes to the weight of it. There is some similarity. It goes to the weight of it.

Mr. Townsend: I offer that model as KK.

(The model was marked "Defendant's Exhibit KK.")

The Court: We will take a recess for a few minutes.

(After recess:)

Mr. Townsend: Further considering this chart HH of Wasser patent, kindred art, Wasser patent 1829, have you any patents on there illustrated on that chart, or in evidence, that you want to call attention to with particular respect to a pivoting action of a conical member?

A. Yes. The Colby patent, 964,395, to which I heretofore referred, is for a sleeve protector or a frustro-conical cuff-like or collar-like member, that goes around the arms of the wearer, and regarding the connection which is the hook and slot type as we referred to this morning, the patent says, reading from page 1 of the patent, lines 88 to 105:

"The outer edge of the tab is so formed that when inserted in the slot, it extends across and is interlocked with the outer end of the slot, so that the tab cannot move outwardly in the direction of

(Testimony of Irving C. Roemer.)

the axis of the protector toward the hand of the wearer in the direction indicated by the arrow Z when the protector is adjusted for use, as shown in Fig. 2, the only possible direction of movement of the tab out of the slot being that indicated by the arrow Y.

“The tab is adapted to swing in the slot 15 while in locking engagement therewith, so that the taper of the tube may be varied to suit the proportions of the forearm of the wearer, a stout forearm requiring a greater degree of taper than one which is relatively slim.”

Those words in the patent relate to what we have been speaking [331] about as a pivotal action, which permits an enlargement of the upper end of the cone-like member.

Q. Upper end, or the smaller end?

A. Either end, in this case, yes.

Q. Now, have you another reference which makes reference to a pivotal action on the end of a collar for performing that function?

A. I would like again to refer to the Swiss patent to Huber, 110,722, and read from the translation of the specification of that patent wherein it says—

Q. As you read, indicate to the Court the position of the numerals to which it refers.

A. “The drop catcher shown in Fig. 1, consists of a simple strip 5 of blotting paper, the two ends 6 and 7 of which are fastened together with a clasp. Such a drop catcher may be made of blotting paper,

(Testimony of Irving C. Roemer.)

and show advertising matter, according to the contents of the bottle, or for the use in certain taverns, for instance naming the company providing the drop catcher. Such an advertisement will be effective, as it will attract special attention of the guests not being familiar with it. The clasp 8 allows some change of the end of the strips and thus a change of the form of the drop catcher. If it is placed on the bottle neck, it will drop down as far as possible. By a slight pressure at the upper or lower opening it will widen respectively and the larger part of the strip will adhere to the surface of the bottle, this being of paramount importance for its effect."

That, being a translation from the Swiss, is not worded exactly as we would word it, but it means the same thing as we have been discussing here, that is, that these connecting ends of this structure can pivot relatively to each other to vary the shape of the cone slightly to enlarge the upper end or the lower end. [332]

Q. What reference, if any, has the matter that you have just read to any of defendant's structures we have here, so far as that staple and eyelet pivotal action is concerned?

A. This Exhibit V has an eyelet of the type that is used in the Swiss patent; the member 8 of the Swiss patent is apparently substantially the same as—that was, it is a little eyelet used in Exhibit V.

Q. If you omitted the little staple that appears

(Testimony of Irving C. Roemer.)

here on this Exhibit, Defendant's Exhibit V, then how would the two parts operate as compared with the Swiss patent; can you just explain that?

A. Omitting that little staple, and I might say if the dial were taken off here, the circular fit, you would have something that would be in general appearance and function identical with that of the Swiss patent.

Q. Leaving the dial on as it is, and leaving off the staple, would you have pivotal action that would correspond, or would you not have one that would correspond to—

A. Without the staple this will pivot in exactly the same manner as the Swiss patent.

Q. Now, we have had testimony about box locks, paper locks, and on this chart, Exhibit EE, there appears a patent to Klein; what is the date of that patent?

A. The patent to Klein, 704,549, issued on July 15, 1902.

Q. Now, do you find an annular slot engaged with a hook-shaped locking member? A. Yes.

Q. What is the number of the annular slot?

Mr. Rogers: Is that set up in the answer?

Mr. Townsend: That is just prior art.

The Witness: The slot shown at C, for example, in Fig. 7, has an angular extension D.

Mr. Rogers: If the Court please, let it be observed that that patent is not set up in the answer.

(Testimony of Irving C. Roemer.)

Mr. Townsend: It is for the prior art, your Honor.

The Court: Limited to that.

Mr. Townsend: Yes. Now, there is in evidence a blank of a box, Exhibit W, and I am showing that blank, that seems to correspond very closely to that, but it is of a box that is marked "Piedmont Grocery Company," and we marked that hook here No. 19. A. Yes.

Q. And that angular slot 17, 18. A. Yes.

Q. Have you attempted to cut out—

Mr. Kingsland: Your Honor, I object to this whole line of testimony as obviously this box has not been shown to be in the prior art.

Mr. Townsend: No, the box is not, but the structure as testified—

Mr. Kingsland: There is no contention the structure—

The Court: Isn't the structure the same in those boxes that are in evidence?

Mr. Townsend: Yes.

The Court: Why not use them?

Mr. Townsend: Well, they happen to have some markings; if he wants to accept them—

The Court: Why not use the others if they are identical?

Mr. Townsend: It would take a little time to make a drawing. It is for a little different purpose.

Mr. Kingsland: There is no contention that any of these boxes are in the prior art; there is no date when they were first used.

(Testimony of Irving C. Roemer.)

Mr. Townsend: Mr. Borden this morning testified that he was familiar with these particular types of boxes since his early days.

The Court: 40 years. [334]

Mr. Townsend: Yes, and all I want to show is whether or not you can take a form of box like that with an old form of lock and describe a disc which you think reads and turns into a conical shape. That is all there is to it.

The Witness: I took this box, which is a common type of set-up box—

Mr. Townsend: Which I will ask be marked Exhibit LL.

(The box was marked “Defendant’s Exhibit LL.”)

The Witness (Continuing): Formed by slots and tongues in order to hold it in its set-up position, and cut from it a blank. I did not actually cut it from the box, but I have marked the box to show how it could be cut from the box. I have marked the box to show the position in which this blank should have been taken, so that I have used portions of this box, the slits and the tongue, to show the manner in which a bottle collar could be formed. All of the slits in this box happen to be of the angular type, which permits freedom of movement of the tongue to permit the pivotal movement referred to in the patent in suit.

Mr. Townsend: I offer the box as LL and the little model that has been cut out of it there as described as LL-1.

(Testimony of Irving C. Roemer.)

Mr. Rogers: Objected to as obviously immaterial, wholly unnecessary, and as not showing anything that has anything to do with this litigation.

The Court: I will allow it.

(The model was marked "Defendant's Exhibit LL-1.")

Mr. Townsend: Q. In regard to the third patent, the Wasser patent 1999, have you a chart similarly representative of kindred art? I will ask this chart be received as Defendant's Exhibit MM.

(The chart was marked "Defendant's Exhibit MM.")

The Witness: This chart, Exhibit MM, shows patents, or as [335] pasted upon it, the drawings from patents which show certain features of the Wasser patent 1,999,011, and has many of the patents connecting up the similar features found in the earlier patents. The patent to Seely, for example, is a design for a label showing an arcuate form, arcuate blank such as used in the Wasser patent.

The British patent to Brown, 1901, is interesting in that it shows a bottle collar; as a matter of fact, shows several types of bottle collars, and particularly the one shown in Figs. 1 and 3, which is frusto-conical, so that it may be placed over the neck of a bottle in the manner rather crudely illustrated, and the cylindrical collar is shown in Fig. 7.

The Hoard and Miles patent, 47,822, shows a bas-

(Testimony of Irving C. Roemer.)

ket form of an arcuate blank illustrative of the shape of a piece of paper, that is to be formed into a frustro-conical article.

Patent to Knowlton shows a tree protector almost identical in shape with some of the bottle collars that we have seen.

The patent to Cheney, No 716,668, also shows a basket-like holder for flower pots, which is a collar or holder adapted to encircle the flower pot. I may point out with respect to the collars about which we are speaking, of course, a flower pot happens to be tapered in the opposite direction from a milk bottle. If this form of device would be applied to a milk bottle it would be necessary first to turn it upside down and drop it over the bottle.

The Tomlin patent, 1,158,871, shows a megaphone, the shape of which is, of course, familiar. Here the megaphone is bent up out of an arcuate blank, and is illustrative of the fact that any conical collar-like article will be bent up from an arcuate shape blank. [336]

Mr. Townsend: Q. I note the Cheney patent you just referred to has also been referred to by you in connection with the first Wasser patent on the hook shape.

A. Yes. This Cheney patent in Fig. 6 shows the slot and tongue connection for this collar, and shows connections of other types, of other general types shown in the Wasser patent, 1923.

Q. Then you might say that Cheney shows both a pivotal action and a non-pivotal action?

(Testimony of Irving C. Roemer.)

A. Yes.

Q. The non-pivotal being represented by what?

A. In Fig. 2 they use snaps; Fig. 5 they have buckles; Fig. 7 they use a lacing, and they refer to other fastening means.

Mr. Townsend: If I have not specifically offered these charts I ask they all be considered as having been offered and marked. That is all.

Cross Examination

Mr. Kingsland: Q. Mr. Roemer, have you ever been in the advertising business?

A. No, sir.

Q. Have you ever been in the dairy business?

A. No, sir.

Q. What relation have you had, if any, to either one of those industries?

A. I have done patent work for several advertisers and several dairy concerns.

Q. Are you an engineer? A. No, I am not.

Q. Are you an attorney-at-law?

A. No, sir.

Q. What, if any, especial qualifications have you with respect to testifying on display devices connected particularly with the dairy business?

A. Why, I am testifying to certain mechanical structures.

Q. Only that? A. Yes.

Q. I mean to say you are not giving opinions beyond any special qualifications in any of the industries that I have mentioned, [337] that is to

(Testimony of Irving C. Roemer.)

say, the dairy business, or the advertising business.

A. No, I don't believe any of my testimony has been directed toward the matter printed on these collars, only to the physical structure and the manner in which they fit on a certain shaped bottle.

Q. You referred to a model, I believe this model that you referred to is Defendant's GG. Now, what patent did you say that was a model of?

A. Well, I don't recall the name of the patent offhand. There are so many patents I would like to have a glance at all of them, because I can tell by looking at the drawings.

The Court: You have the drawings there.

Mr. Kingsland: Q. Is that the Guardino patent 1,300,164? I thought he said it was a model of the Guardino patent, 1,300,164.

Mr. Townsend: What date?

Mr. Kingsland: Dated April 8, 1919.

Q. Will you please refer to that patent?

A. Yes, that is correct.

Q. Have you prepared that model GG as a model of the disclosure of the Guardino patent?

A. Yes.

Q. What do you understand to be the disclosure of the Guardino patent? What is it for?

A. The Guardino patent relates to a container.

Q. Well, as a matter of fact, it is a paper container such as they put charlotte russe in, isn't it?

A. Yes.

Q. And it has a partitioned wall in it, has it not?

A. Yes.

(Testimony of Irving C. Roemer.)

Q. Does the contour of the curve in this model GG follow the contour of the curve in the drawing of the Guardino patent?

A. Not quite. I believe I stated that it had been modified for this cone, so this cone would fit a standard milk bottle; if it were made exactly as shown in the Guardino patent it would then [338] fit some other shape of bottle, but wouldn't be suitable for a milk bottle.

Q. As I understand your testimony, you want us to understand that having merely the Guardino patent before you, you could produce a bottle collar of the model that you have in your hand marked GG?

A. Well, there it is.

Q. Do you find in the Guardino patent any representation on the outside it was for a bottle collar, that is, an advertising display.

A. No.

Q. Why did you color it up?

A. I testified that this had been colored to show how it would look as a bottle collar.

Q. In other words, you transformed the Guardino patent, which is nothing more than a container made for charlotte russe, into a bottle collar?

A. Yes.

Mr. Townsend: No, wait a minute.

Mr. Kingsland: This is cross-examination.

Mr. Townsend: Just a minute.

Mr. Kingsland: He may answer?

The Court: Yes.

Mr. Townsend: I don't like to interrupt on any

(Testimony of Irving C. Roemer.)

proper cross-examination, but it is a question that comes under the application of the rule that an old thing and a new use is not patentable. He is trying to make out a man can't adopt a thing that the skill of the operator calls for when another use is wanted. The article itself suggests its use.

The Court: As I follow the testimony in chief, it is substantially as the record discloses now. Now, if I am mistaken I will stand corrected. He indicated in his direct examination substantially as he has testified on cross-examination. If I am mistaken about that I want to be corrected. [339]

Mr. Kingsland: As I understood him to say on direct, he said that it was an exact model of the Guardino patent.

The Court: No.

Mr. Kingsland: This was the one that was not limited. As I understood that he presented this as a reproduction of—

The Court: That is true. I did not check up on that, but I followed him in substance. Now, I might be in error that it was discussed, but he said, he indicated on direct examination that he put that on, himself, that is, that matter on the outside of it. What was it you said in that regard?

A. I simply said, as I recall, it had been colored to make it more like a bottle collar.

The Court: Yes. I was not misled on it, myself.

Mr. Kingsland: But the point was, as I under-

(Testimony of Irving C. Roemer.)

stand it, this model was not one that was limited to show any particular feature.

The Court: That may be true.

Mr. Kingsland: But was presented as a reproduction of the Guardino patent teaching the production of the bottle collar. I thought that was what the witness said.

The Witness: Well, if I did say that I would like to correct my testimony, because I did not mean to claim that any of these were exact reproductions.

Mr. Kingsland: Well, as long as we understand each other that is all right. I wanted to clear that point, because I did get the very definite impression that you had represented this as a reproduction of the Guardino patent.

Q. Now, let's take the patent which is referred to as Patent A, 1829; will you tell me, first, whether or not you know of any references in the prior art that in your opinion completely meet that disclosure? [340]

A. I think that the patents shown on this chart, Defendant's Exhibit HH, rather fully anticipate the disclosure of the Wasser patent.

The Court: Point it out.

Mr. Kingsland: Q. Which patent? Is there a single patent that meets it?

A. All of the patents show conical shapes. Other than the conical shape all that there is here is a connection which permits pivoting of a conical shape, and we find that connection also in several of

(Testimony of Irving C. Roemer.)

the patents, like the patent to Goes, Colby, Taylor; they show those pivotal connections.

Q. Can you answer as to whether you can name any of the patents shown on this chart that, in your opinion, solely and alone anticipate the disclosure of this Wasser patent we are referring to?

A. I wouldn't like to name any particular patent as being the one alone that anticipates it.

Q. There is none on that chart, then, in your opinion, that anticipates the disclosure of the Wasser patent?

A. No. There are several that, in my opinion, anticipate the disclosures.

Q. Will you tell me which one alone anticipates without the addition of any other item of the prior art, in your opinion?

A. Well, in my opinion the patent to Goes, Colby, Spellman are very good examples of anticipatory patents.

Q. Those patents you have named show, in your opinion, every feature of the disclosure of this Wasser patent?

A. Well, I did not make that statement. Certainly they don't [341] show every feature of the disclosure of the Wasser patent, and I don't think that anticipation, that that is——

Q. I am not endeavoring to misquote you. I am asking as to whether or not you can take any one of those references and say whether or not, in your opinion, they completely meet all of the features of the Wasser disclosure.

(Testimony of Irving C. Roemer.)

Mr. Townsend: You mean the claim features, or every feature shown in the drawing?

Mr. Kingsland: The invention of the Wasser patent. He said, I believe——

Mr. Townsend: Well, he answered you several times.

Mr. Kingsland: Mr. Townsend, will you permit me to cross-examine the witness, please?

The Court: Will you be kind enough to be seated where you will be comfortable?

Mr. Townsend: I beg your pardon, sir.

Mr. Kingsland: Q. Do you understand my question, Mr. Roemer? What I want to get from you is whether you can pick out of this group of patents any single one that, in your opinion, meets the invention of the Wasser patent, as you understand it?

A. Yes. As I understand the invention of the Wasser patent, it is anticipated by the patent to Colby, by the patent to Goes, by the patent to Taylor.

Q. Well, tell me what you consider the Wasser patent discloses, this particular one? You say as you understand it—I would like to get a definition from you as to what you understand this patent to cover.

A. You are confusing me a little bit. I do not mean to argue with you.

Q. I don't want to. I want to be fair with you, and I want you to be fair with me.

A. I want to get your question clearly. [342]

(Testimony of Irving C. Roemer.)

What is claimed in the patent, or disclosed by the patent, what I think that was?

Q. Well, you made the statement that as you understood the Wasser invention of this patent that these three named patents anticipate it. Then I now ask you what your understanding was of the invention of Wasser's patent?

A. I think that is clear now. My understanding of the invention of the Wasser patent is that it is a means of connecting the ends of an arcuate blank which is capable of being formed into a frustro-conical form and the means being such that after the ends of the blank are connected they are free to pivot in a manner which will permit enlargement of the upper end of this frustro-conical form. I think that is what the Wasser patent is directed to.

Q. With that understanding, then, the named patents, the ones you last named, in your opinion, then, totally anticipate that structure, is that right?

A. Yes, I think so.

Q. Do you know how many of those you have referred to were a part of the Patent Office record, if any?

A. I can check that. I wouldn't like to rely on my memory for it.

Q. Well, did you give any consideration to whether or not they had been passed on by the Patent Office in reaching your opinion that they anticipated this Wasser invention?

A. Yes, I have considered them in that respect.

Q. Well, I would like to move along, because that is a matter that can be checked.

(Testimony of Irving C. Roemer.)

A. Very well.

Q. As I understand, you charge this Patent A, No. 1829, to be limited to the particular form of tongue and slot for connecting the ends of the strip, is that your view of it?

A. Yes. I did not make that statement, though.

Q. That is what I deduced from what you said. Did you have [343] anything in mind other than that?

A. Not necessarily. That particular form, and a form, as I expressed it a moment ago, which would permit that particular pivot or pivotal connection which allows enlargement of the upper end of the means.

Q. Now, on the assumption that the invention is broader than simply that, on the assumption the invention includes that, that is not limited to the means of connecting alone, do you still say that the patents you named completely anticipate it?

A. Well, I would have to assume a good many things to answer that question.

Q. No. Just the assumption that it is beyond the narrow definition of that invention that you have named.

A. How far beyond?

Q. Up to any extent you want to qualify it. You have said, as I understand, that you say the first Wasser invention, the one we are talking of, is to be limited to a means of holding the ends together in such a manner that they will not pivot. Is that correct?

A. Yes.

Q. On the assumption that it is anything broader

(Testimony of Irving C. Roemer.)

than that in the way of a combination, would you still say that it was met by the patents that you have named, or are these patents you have named simply anticipations of that connecting means; do you follow me?

A. I think I follow you. My answer is yes, of course, if you assumed that you had a broader patent these patents wouldn't be in existence, because your broader patent would not ever have been allowed in view of these patents.

Q. If the invention of the patent was to be interpreted as including combination beyond simply the connecting means then you do not find it in the references you referred to? In other words, let me put it this way: Isn't it true that you have related these patents to the Wasser patents because, as you feel, you find in [344] them the same or equivalent means for connecting ends of the bottle collar?

A. Oh, I find a great deal more than that.

Q. What do you find beyond that?

A. I see an arcuate blank capable of being brought up into a conical form, frustro-conical form, and having its ends connected together by a tongue and slit.

Q. Well, then, you would still say the same patents that you have named singly and of themselves are completely anticipatory of the Wasser invention?
A. That is my opinion, yes.

Q. In other words, you are saying anticipation as distinguished from lack of invention, are you? Do you understand what I mean?

(Testimony of Irving C. Roemer.)

A. I don't know if I do.

Q. Let me put it this way: what you mean to say is that the patents that you have named completely meet the Wasser invention as you have considered it to be. Is that right?

A. They completely meet the invention, what I consider to be the invention, indeed.

Q. In your opinion, in other words, your position is that it is an absolute and complete anticipation if we take any of the patents that you have referred to with the Wasser first invention, A?

A. Yes.

Q. In connection with the patent that we call 1999, as I understand you to say you consider that that patent is definitely limited to a permanent connection of the ends of the strip? A. Yes.

Q. You say that defendant's collar, such as that exemplified by Exhibit 21, that that is not permanently connected?

A. No, I don't consider that a permanent connection.

Q. Well, does the connection in Exhibit 21 when it is in place so the collar is formed and put on the bottle, does it keep the ends relatively fixed?

A. Yes.

Q. You see no distinction between permanent and immovably connect- [345] ed? A. Yes.

Q. Permanently connected and immovably connected?

A. Yes, there is a difference.

Q. You do draw a distinction between immov-

(Testimony of Irving C. Roemer.)

ably connected, permanently connected, and relatively fixed?

A. Yes. When we use those terms, or when I used those terms I was referring to this patent and referring to the use of the term "immovable connection" as it is found in this patent. You, of course, in learning what the terms mean in the patent, find it necessary to read the whole patent and find out the type of connection outlined when they refer to "immovable connection." I think it is obvious from the specification that "immovable", as used in this patent, is practically synonymous with "permanent".

The Court: If it will be of help to counsel, we can stop now and continue tomorrow.

Mr. Kingsland: I think both of us would like to finish to-day, if possible. I won't be more than thirty minutes with this witness, your Honor: I will be through as soon as I can.

The Court: You may proceed.

Mr. Kingsland: Q. As I understand your testimony on direct examination I believe you took the position that the defendant's collar, or for example Plaintiff's Exhibit 21, did not have a lower diameter substantially equal to the diameter of the standard milk bottle. Is that right?

A. In the sense that that term is used, that is true. I may wish to correct myself with respect to Exhibit 21. I think I was looking at another exhibit when I made that statement. I think it was Exhibit 22.

(Testimony of Irving C. Roemer.)

Q. Well, there was one of them that you put on the desk, and you said because it was not flat on the desk that it did not have a diameter equal to the diameter of the bottle. [346]

The Court: Is that it? A. Yes.

The Court: Here is the one, I recall it.

Mr. Kingsland: That is No. 22. Your Exhibit 22, you have said that the lower diameter is not substantially equal to the body diameter of the bottle, itself.

The Court: Turn it around. Turn it around in front of us.

Mr. Kingsland: This way?

The Court: There.

The Witness: I think I said the lower diameter of that was not measureable in the same sense that the lower diameter of the bottle——

Mr. Kingsland: Q. From a practical standpoint is there any difference between that and that Exhibit 25?

A. From a practical viewpoint there is very little difference in it or the size of the lower diameter from a strictly practical standpoint. However, in reading the patent and finding out what is meant by a lower diameter and its position, there is considerable difference.

Q. Are you able to draw any practical distinction between the way Exhibit 25 fits on that milk bottle——

The Court: (Interrupting): Only in relation to the language of the patent, he said.

(Testimony of Irving C. Roemer.)

The Witness: That is what I said.

Mr. Kingsland: Your Honor gets him quicker than I do. Q. Am I correct in understanding you to say that Exhibits 3, 4, and 5, you are familiar with the ones I am referring to, are you?

A. Yes.

Q. 3, 4, and 5, I want to ask you, whether it is your position that the connecting means of these particular exhibits do not have the function of holding the strip in the form of a truncated cone and to permit the enlargement of the upper diameter? [347]

A. They have the first function.

Q. They hold it in the form of a truncated position but it is your position they do not——

A. Just a moment. According to the question, that question was rather misleading, I mean you had me confused. To answer you accurately, the connecting means has nothing to do with the enlargement of the upper diameter, and the words you read taken from the claim of the patent mean that the connecting means is so formed that it permits the enlargement of the upper end. You may find it bulging and stretching, I think in one way or another, that the upper end may be enlarged, but there are other connecting means which permit the enlargement of the upper end. Any paper article such as this may be enlarged in any dimension by being bulged or pulled out of shape.

Q. That is partly true, but paper does not stretch, does it? A. Very little.

(Testimony of Irving C. Roemer.)

Q. Well, practically nothing?

A. No, it may be deformed.

The Court: Do you know what I had in mind? I was thinking if this strip was made of steel what would the result be?

Mr. Kingsland: You mean as to whether it would fit over?

The Court: As to whether or not it would enlarge.

Mr. Kingsland: It would enlarge on account of the connection.

The Court: Is it fair to say that?

Mr. Kingsland: Is that true?

The Witness: Indeed not. It would not enlarge on account of the connection.

Q. Let's assume a piece of steel——

A. Yes. I am assuming a thin piece of steel like sheet metal.

The Court: Yes.

Mr. Kingsland: Yes.

A. That would not enlarge on account of the connection. It will [348] not enlarge now any more than it would enlarge if I glued the ends of it together. Just take that and put glue under here and close it together and that will not enlarge any more than it does right now.

Mr. Townsend: Identify the article.

A. In this device, Plaintiff's Exhibit—I have just been referring to Plaintiff's Exhibit 3. Now, I refer to Plaintiff's Exhibit 25, which is a model of the plaintiff's device which is contended to enlarge

(Testimony of Irving C. Roemer.)

at the top. If I glued that together that enlarging function would be entirely lost. The enlarging of the top, here, is a direct result of the connecting means. If we glue this together you can still enlarge the top of it to some extent. You enlarge the top of the defendant's device by deforming—

The Court: All right. Open both of them and differentiate. Explain when they are open the difference between both.

A. On Exhibit 25, which is the plaintiff's device, the slit through which the tongue extends is an angular slit. On Exhibit 3, which is a model of the defendant's device, the slit is not angular. It is a perfectly straight slit.

Q. As a practical matter, this Exhibit 3, in your opinion, the connection is immovable; that is, immovable when it is in use?

A. It is immovable in one sense of the word, yes.

Q. Well, immovable in the only sense in which it is significant; isn't that true?

A. No. It can be taken apart and placed together; it is not glued together.

Q. Would there be any utility in gluing it together, or stapling it together over what you conceive to be this construction where it will not move at the connection? A. I see none.

Q. Then you do say in this Exhibit 3, in your opinion you find that it is a display device, do you not? A. Yes, indeed. [349]

(Testimony of Irving C. Roemer.)

Q. And it is adapted to be applied to bottles having a cylindrical body portion?

A. Yes, a milk bottle.

Q. And with tapered necks to an enlarged top flange?

A. I think all bottles have that.

Q. You find it comprises an arcuate piece of paper, don't you? A. No, I don't.

Q. Where do we differ on that? Isn't that substantially an arcuate piece of paper?

A. Well, substantially it might be called an arcuate piece of paper, but when we read the patent and find out what arcuate means in the patent, exactly what it means, and the patent goes into some detail, the purpose of having the thing form on an exact arcuate shape, I wouldn't call that an arcuate piece of paper as set forth in that claim which you are reading.

Q. Well, it is adapted for a truncated cone with ends overlapping? A. Correct.

Q. With a lower diameter of approximately equal to the body portion of the bottle. This one does it, Exhibit 3?

A. Yes. I would say for practical purposes it was.

Q. And it has an upper diameter approximately equal to the top flange of the bottle over which it is to be used?

A. I have never measured that. It is of sufficient size that it may be passed over the top flange.

Q. Suppose you look at it, because we would like

(Testimony of Irving C. Roemer.)

to get it clear. I show you this standard bottle. Will you check it and answer?

A. I am put in the position of having to ask you a question, because I cannot answer your question that way.

Q. All right.

A. If you will tell me where the upper diameter of this is, because it is formed on a very wavy line.

Q. We will call it the upper diameter.

A. Measure it from the back on a horizontal plane—— [350]

Q. You understand this patent, do you not?

A. Yes, I think I do.

Q. You know what is meant there in the disclosure as to what the upper diameter is?

A. I mean the upper diameter something like the one on this model, Plaintiff's Exhibit 25.

Q. The only point now I am asking is whether or not the upper diameter of that particular device, Exhibit 3, is approximately equal to the top flange of the bottle, speaking now of a bottle that has been defined as a standard milk bottle.

A. Well, I can say this: of a size that will permit it to be placed over the top of the bottle very easily.

Q. There isn't much excess diameter there?

A. No.

Q. It is pretty close, this particular diameter?

A. I don't like to call it diameter.

Q. Let's not quibble on words. What we want to know is whether or not this Exhibit 3, when we

(Testimony of Irving C. Roemer.)

come down there the top of that bottle is approximately the same, the diameter of the top is approximately equal to the diameter across the bottle, here; you will agree with me on that, won't you?

A. I have agreed to the extent that it fits over the bottle very easily.

Q. When it is on the bottle that device is so shaped that when the lower edge is concentric with the longitudinal axis of the bottle the upper edge of the device will be located at different distances from that bottle?

A. The device does not fit on the bottle in that manner.

Q. You know what that language means in the patent?

A. Yes, I do.

Q. And you disagree, and believe that that language does not describe this structure?

A. Yes, that is my position.

Q. You say it does not describe it. Well, now, compare that with the Exhibit No. 25 and then tell us just where those two [351] devices differ, leaving out the question of inability of the connections.

The Court: Show us how they differ.

A. This device is so formed that when it is placed on the bottle it has a bottom edge. As I said a while ago, that is perfectly horizontal, when the bottle is standing in a vertical position. This device is shaped to produce a pleasing effect around the bottle, and being nestled to the bottle at all points it does not have a lower diameter that is concentric, the word "concentric" means a certain thing that is incapable of application to—

(Testimony of Irving C. Roemer.)

Q. Are you using those words in a pure geometric sense?

A. Yes, I am using them as they were used in the patent.

Q. Will you agree with me that those two devices you have before you, namely, Exhibits 3 and 25, for all practical purposes perform the same function and get the same result?

A. Yes, for all practical purposes.

Mr. Kingsland: Q. Will you tell me as to patent 1999, that is the one we have referred to as C, whether or not you find in the prior art any reference that, in your opinion, completely meets the structure of the disclosure?

A. Yes. The patent to Brown, the British patent to Brown is, in my opinion, completely anticipatory of Wasser, anticipates everything that is shown in this Wasser patent. The only difference that I can see between [352] the two patents is the Wasser patent being shaped and sized to fit a milk bottle, while the basis of the Brown patent is of a shape and size to fit a poison bottle, or a bottle of slightly different shape.

Q. You are aware, of course, the Brown reference was before the Patent Office when this case was allowed. A. Yes.

Q. You knew that? A. Yes.

Q. You took that into consideration?

A. Yes. The patent to Knowlton and the patent to Cheney both show structures very similar to the Wasser patent.

(Testimony of Irving C. Roemer.)

Q. That Knowlton reference, your Honor, that is a tree protector.

The Witness: Cheney is a device to go around a flower pot. The Tomlin patent shows a device, all you need do is change the shape to make it fit a milk bottle and it would have all the structure of the Wasser patent.

Q. Those are all remote art, as you suggest, they are not related to bottle collars or advertising devices?

A. The patent to Cheney is very closely related. It is a collar to go around a flower pot which is cone-shaped, like the neck of a milk bottle.

Q. Now, none of those references have a sloping top?

A. The Brown patent most certainly has a sloping top. It happens to be of different proportions than a milk bottle. The British patent to Brown, I see a sloping top there. If you read the specification of that patent you can find the device is intended to fit a bottle the size and shape that Wasser's is intended to fit. The same is true of the Cheney patent, where they don't show any particular size or shape of flower pot, that simply means the frustraconical form is made to suit the size of the flower pot to which it is to be applied.

Q. Am I to understand you that you say the British patent to [353] Brown completely anticipates this 1999 patent; in other words, you conceive the Brown patent discloses a sloping top for the device?

(Testimony of Irving C. Roemer.)

A. I did not say that. I said I considered it completely anticipates, I did not say because it had a sloping top.

Q. I asked you whether it had a sloping top.

A. I said yes.

Q. You are of the opinion that it completely anticipates this patent 1999 because it has a sloping top, or are you giving that no significance at all?

A. That has some significance, of course.

Q. Would you consider if the Brown patent did not disclose that sloping top it would still be a complete anticipation of this patent 1999?

A. Yes. As I view this Wasser patent, I think the Brown patent is a complete anticipation.

Q. Regardless of the position of the plane of the top of the device?

A. I did not make that statement.

Q. I thought you did. A. It does have——

Q. Are you giving significance to the fact that the Brown patent does have the sloping top in order to meet the Wasser disclosure?

A. It happens to disclose the sloping top.

Q. Well——

A. I don't mean to quibble, but I think you are quibbling with me.

Q. No.

A. While the Brown patent does have that sloping top it has a shoulder on it—this is a very hastily made free-hand drawing, as anyone can see—it does not seem to make much difference whether it happens to illustrate a bottle with top sloping a little more or a little less.

(Testimony of Irving C. Roemer.)

Q. Well, I think we are both talking about another subject. This plane across the top of Fig. 3 of this disclosure, is it your conception of that that that has a sloping plane in respect of a plane through the bottom?

A. No, no. I don't think it is [354] intended to be. I am sorry.

Q. I am sorry, too, because you were talking about the bottle and I was talking about the device. Now, regardless of whether the top of the device, as shown in Brown slopes, you still conceive it to be completely anticipatory of this Wasser patent 1999; am I correct in that?

A. I believe it is substantially anticipated, yes.

Q. Do we have to go to any other item in the prior art in order to complete the anticipation? Anticipation is either complete anticipation or it is not an anticipation, as I understand it.

A. Well, I don't agree with you.

Q. Well, I am not going to argue that. Well, what I want to say is this: you concede you have to go to some item of the prior art to find any element in order to completely meet this Wasser patent 1999, the Brown patent?

A. Well, I have in my mind the several devices that we have been referring to here, and so far as they are concerned the Brown patent is all that is necessary to anticipate that Wasser patent.

Mr. Kingsland: That is all.

Mr. Townsend: Defendant rests.

Mr. Kingsland: Of course, there are several motions to strike certain testimony on the record, and we don't know what the practice here is, but in order to save the record I would like to move to strike that evidence that was allowed in under that condition, and may I suggest that that be taken with the case, so we can argue it on the briefs?

The Court: Very well. Let this be off the record.
(Discussion off the record.)

Mr. Rogers: We should like to move—it was submitted yes- [355] terday, a collar without a staple—

The Court: There was one with a staple.

Mr. Rogers: This doesn't have a staple. We should like to have it offered as Plaintiff's Exhibit 28.

The Court: Yes.

(The collar was marked "Plaintiff's Exhibit 28.")

[Endorsed]: Filed Dec. 15, 1939. [356]

[Endorsed]: No. 9744. United States Circuit Court of Appeals for the Ninth Circuit. Pevely Dairy Company, a corporation, Appellant, vs. Borden Printing Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 14, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
TRANSCRIPT OF RECORD

Good cause appearing, it is hereby

Ordered, that plaintiff's time to file the transcript of Record on Appeal herein and the action docketed under Rule 73 of the Federal Rules of Civil Procedure, is enlarged for a period of fifteen days, or to and including February 15, 1941.

FRANCIS A. GARRECHT,
United States Circuit Judge.

January 30, 1941.

[Endorsed]: Filed Jan. 30, 1941. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Feb. 14, 1941. Paul P. O'Brien, Clerk. [356A]

In the United States Circuit Court of
Appeals for the Ninth Circuit

No. 9744

PEVELY DAIRY COMPANY, a Corporation,
Appellant,

v.

BORDEN PRINTING COMPANY,
a Corporation,
Appellee.

APPELLANT'S DESIGNATION OF PARTS OF
THE RECORD TO BE PRINTED

1. Bill of Complaint. (Clerk's transcript page 1)*
2. Defendant's Motion for Bill of Particulars, (P. 7).
3. Plaintiff's Motion for Particulars (P. 12), omitting "Reasons", (P. 14).
4. Order on Motions, (P. 15).
5. Defendant's Particulars, (P. 17).
6. Plaintiff's Particulars, (P. 19), but omitting the material beginning at the top of page 3 thereof and extending *(Pages in parenthesis throughout refer to Clerk's Transcript.) [357] through the first four lines of page 4; omitting the material beginning with and under the heading "Claim 9" on page 5 thereof; and extending through all the material under and including the heading "Claim 10" on page 6 down to the heading "Claim 11"; omitting the material under and including the heading "Claim 1" on page 7 to and including all the material under the heading "Claim 2" on page 8, down to the head-

ing beginning "Claim 3"; omitting all the material on page 9 including and under the heading "Patent No. 1,923,856." The following also shall be omitted: All the material including and after the heading "Claim 5" on page 10 which includes the material including and after the heading "Claim 6"; the material including and under the heading "Claim 9" and the material including and under the heading "Claim 10" and page 11; the material including and under the heading "Claim 5" to the righthand side of page 11a; the material including and under the heading "Claim 9" on the righthand side of page 11a; the material including and under the heading "Claim 10" at the bottom of page 11a; all the material after the heading "(b) Patent No. 1,999,011" on page 12 including the heading "Claim 1" and the material thereunder and the heading "Claim 2" and the material thereunder; the heading and all of the material under item "V" on page 13.

There shall also be omitted exhibits 8 through 20 annexed to this bill of particulars with the statement that:

Exhibits 11 through 16 are physical Exhibits and are being transmitted as such to this Court.

7. Supplemental complaint, (P. 68).

8. Plaintiff's motion for second bill of particulars, (P. 70).

9. Plaintiff's second bill of particulars, (P. 73).

10. Answer to bill of complaint and supplemental complaint, (P. 77).

11. Plaintiff's motion to strike, (P. 97), eliminating [358] the heading "Remarks" on page 2 and all the material thereunder.

12. Plaintiff's motion for further bill of particulars, (P. 99).

13. Reply to set-off, counterclaim and cross complaint, (P. 102).

14. Defendant's bill of particulars, (P. 105), including the following statement:

Exhibits A through D annexed to the bill of particulars are physical Exhibits 21, 22, AA and V transmitted as physical exhibits to this Court, as was Exhibit E.

15. Order of October 7, 1939, (P. 113).

16. Defendant's bill of particulars, (P. 114).

17. Decision of Judge Roche, (P. 117).

18. Notice of decision by Judge Roche, (P. 118).

19. Findings of fact and conclusions of law, (P. 119).

20. Judgment dated August 9, 1940, (P. 127).

21. Notice of appeal filed November 4, 1940, (P. 130).

22. Cost bond on appeal, (P. 131).

23. Points to be relied upon on appeal, (P. 132).

24. Clerk's certificate.

25. Order of Circuit Court of Appeals extending time to file transcript of record.

26. Reporter's Transcript as follows:

(P.1), line 19, omit the words beginning with "THE CLERK", and ending with "proceed.", line 29.

(P.2), line 2, omit the words beginning with "At", and ending with "bottle.", line 10. Line 19, after the period, insert —(Note: No appeal is taken on this patent 1,923,856)—

(P.3), line 6, after "litigation.", omit the rest of the page.

Omit (P.4) and (P.5). [359]

(P.6), line 1, omit the words beginning with "is no" and ending with "first.", line 20. Line 27, beginning with "To follow" and ending with "for", omit the rest of the page.

Omit (P.7).

(P.8), omit lines 1 to 4, inclusive. Line 12, after "They" omit to and including the word "and", line 12. Line 14, beginning with "the Answer", omit the words to and including "rather," same line.

(P.10), line 10, after "and," substitute—beyond—for "like". Line 11, substitute—charge—for "change".

(P.11), beginning with the word "Now", line 4, omit the rest of the page.

Omit (P.12).

(P.13) cancel the page to and including line 21.

(P.14), line 18, before the first "are", insert—as originally filed—. Cancel lines 21-28, inclusive.

(P.15), line 5, substitute—A—for the "U" in "KINGSLAND". Cancel lines 12-30, inclusive.

(P.16), cancel lines 1 to 21, inclusive, and lines 27 to 30, inclusive.

(P.17), omit lines 1 and 2. Line 12, after "Exhibit", substitute—5—for "3". Omit lines 14-17, inclusive, and lines 27-30, inclusive.

(P.18), omit lines 1, 2 and 3. After the word "Exhibit", line 9, omit the rest of the sentence.

(P.19), line 1, after "copies", substitute—but—for "or" and delete lines 2-3, inclusive. Beginning

at line 12 with "Do", omit the material to and including "rule.", line 18. Beginning with "which", line 21, omit to and including the sentence ending with "21.", line 23. Line 26, omit the words beginning with "under" and ending with "s," at line 28. Substitute a comma for the period after "Complaint", line 28 and add —as—. After [360] "Complaint", line 28, omit "That is".

(P.20), line 4, after "Wood," insert—Inc.—. After the comma, line 6, omit the words beginning with "title" and ending with "Inc.," line 7. Line 9, after "suit", change "invludes" to —includes—. Beginning with "If", line 16, omit to and including line 22, ending with "public."

(P.21), omit lines 9 and 10. Line 15, change "Manhart" to —Manhard—. Line 17, beginning with "THE", omit to the end of the line 27. Omit lines 29 and 30.

(P.22), omit lines 1 to 9, inclusive. Line 16, change "Bottal" to —bottle—. Omit lines 19 to 24, inclusive. Omit line 30.

(P.23), omit line 1. Line 14, omit beginning with "Q" and ending with "A", and after "San Francisco.", line 13, continue same paragraph with "They have plants", line 14. After "1930.", line 19, continue same paragraph with "That was", line 21. Omit lines 25 to 30, inclusive.

(P.24), omit line 1. Line 7, beginning with "Q", omit the words, ending with "Company?". Line 7, omit the words "A Yes.". After "extensively.", line 6, continue with the words "I am speaking", lines 7 and 8. Cancel lines 18 to 30, inclusive.

(P.25), omit lines 1 and 2. Omit lines 7 to 13, inclusive. Omit lines 16 to 22, inclusive. Line 23, after "Q", omit "Well," and capitalize "Were".

(P.27), line 13, correct spelling of "percentage".

(P.28), omit lines 24 to 30, inclusive.

(P.29), omit lines 1 to 4, inclusive.

(P.30), line 5, omit "A. I believe so.", and continue after "Court?" with "A. It consists", etc., line 6. Line 20, after "paper hangers?", omit balance of page, to but not including "A. Yes." at the end of line 30.

(P.31), line 1, omit "MR. TOWNSEND:". Line 25, change [361] "Manhart" to —Manhard—.

(P.32), line 29, change "GOERS" to —ROGERS".

(P.33), omit lines 11 and 12. Line 15, omit "Recalled" and substitute —Called by Plaintiff—. Same line, at the right margin, insert —Sworn—.

(P.35), line 20, omit the words beginning with "We were" and ending with "was all.", line 30.

(P.36), omit lines 1 to 9, inclusive.

(P.38), line 27, after "country", omit the words beginning with "THE", line 28 and ending with "Yes.", line 28 and make the capital "D" in "During" a small letter.

(P.39), line 17, substitute —west— for "went."

(P.39½), lines 4 and 5 are to be omitted.

(P.40), line 18, substitute —collars— for "covers".

(P.41), line 6, substitute —collars— for "covers".

(P.44), line 13, beginning with “MR.” omit the words through line 16, ending with “right.”

(P.45), omit lines 1 to 6, inclusive and the words “MR. KINGSLAND:” on line 7.

(P.46), omit lines 13 to 22, inclusive.

(P.47), line 7, substitute —invasion— for “imputation”. Line 10, substitute —collar— for “cover”.

(P.60), line 26, omit the words beginning with “MR”. and ending with “seat.”

(P.63), line 26, substitute —hangers—for “gang-ers”.

(P.66), omit lines 23 to 26, inclusive.

(P.69), beginning with the words “MR. TOWNSEND”, line 11, omit the rest of the page.

Omit pages as follows: (P.70), (P.71) and (P.72).

(P.73), omit lines 1 to 10, inclusive. Line 11, omit “(The chart was marked “Defendant’s Exhibit I.”. Line 12, after “Chart” add —, Defendant’s Exhibit I,—. Line 17 after “1923.” [362] cancel the words, beginning with “Patent” and ending with “action.”, line 21. Follow the date “1923.”, line 17 with line 22 (no paragraph), beginning with “No. 5”. Omit lines 23 to 25, inclusive. Line 29, substitute —1939— for “2923”.

(P.74), omit lines 1 and 2. Omit lines 3 to 6, inclusive. Line 7, before “Now”, insert as the beginning of the paragraph, —MR. TOWNSEND:—.

(P.75), line 16, substitute —investigation— for “litigation”.

(P.82), omit lines 29 and 30.

Omit (P.83), (P.84), and lines 1 to 3, inclusive, of (P.85).

(P.86), omit lines 8 to 12, inclusive, and lines 28 and 29.

(P.87), omit lines 4 to 9, inclusive.

(P.89), delete "subsequent to", second occurrence, line 4.

(P.90), omit lines 10 to 22, inclusive.

(P.91), line 11, omit the words starting with "Printing" and ending with "implies?". Same line, after "A", omit "Yes.", and capitalize "printing".

(P.92), line 24, omit "in". Place a period after "use". Before "that" insert —Not—. After "that", insert —it—.

(P. 93), line 3 substitute —anticipation— for "infringement".

(P.94), line 19 after "has", insert —nothing—.

(P.97), line 5, insert —need— for "mean".

(P.99), omit lines 6 to 10, inclusive, and the words "THE WITNESS:", line 11. After the "?", line 5, insert —A—, followed by "We manufacture", etc., line 11. Line 14, omit "MR. TOWNSEND:".

(P.100), omit lines 12 and 13.

(P101), line 2, after "Lawrence", substitute —C— for "E". [363]

(P.103), line 23, omit "Is". Capitalize "that" and insert thereafter —is a—. Line 25, insert a comma after "of". Omit "Neher-Whitehead" and substitute therefor —Pevely Dairy—.

(P.113), line 8, substitute —with— for "at".

(P.114), omit lines 4 to 6, inclusive. Line 11, after “is” insert —not—.

(P.117), omit lines 7 to 13, inclusive.

(P.119), omit lines 10 and 11.

(P.128), line 14, after “did”, insert —not—.

(P.129), line 17, omit beginning with the word “that” and ending with the word “manner”.

(P.135), line 10, after “bottom”, substitute —tab— for “pad”.

(P.136), substitute —at— for “to”, line 21.

(P.140), omit line 30.

(P.141), omit lines 1 to 6, inclusive.

(P.143), line 4, substitute —patent— for “pate”.

(P.145), omit lines 18 to 30, inclusive.

Omit (P.146) and (P.147).

(P.148), omit lines 1 to 17, inclusive.

(P.155), omit lines 8 to 10, inclusive.

(P.156), omit the words in the heading, beginning with “AFTERNOON” and ending with “(Resumed).”

(P.187), omit lines 1 to 4, inclusive.

(P.197), line 21, substitute —concentric—for “concentrix”.

(P.198), omit lines 16 to 22, inclusive.

(P.202), omit lines 7 to 27, inclusive.

Physical Exhibits Not to Be Printed.

All the physical exhibits in this case have been transmitted to the Court of Appeals. In addition, the appellant will supply to the Court of Appeals five (5) copies of patent books, [364] each to include patents Nos. 1,829,915 and 1,999,011 in suit,

together with Defendant's Exhibits R-1 through R-27.

BOYKEN, MOHLER & GORDON,
Attorneys for Appellant.

February 13th, 1941.

Received a copy of the foregoing Appellant's Designation of Parts of Record to be Printed, this 13th day of February, 1941.

ROY C. HACKLEY, JR.,
Attorneys for Appellee.

[Endorsed]: Filed Feb. 14, 1941. Paul P. O'Brien,
Clerk. [365]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT ADOPTING POINTS
ON APPEAL

COMES NOW the appellant above named, and adopts as the points to be relied upon on appeal, the statement of such points appearing in the District Clerk's transcript of record on file herein.

BOYKEN, MOHLER & GORDON,
W. BOYKEN,
Attorneys for Appellant.

Dated this 17th day of February, 1941.

[Endorsed]: Filed Feb. 18, 1941. Paul P. O'Brien,
Clerk. [366]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS
OF THE RECORD TO BE PRINTED

In addition to the designation heretofore filed by appellant, appellee hereby designates further parts of the record to be printed:

Order re Plaintiff's Motion for Plaintiff's Second Bill of Particulars.

Include in the Book of Exhibits Exhibit R-12-1, the translation of the Swiss patent to Huber, No. 110,722. [367]

There are certain errors which should be corrected in appellant's designation of parts of the record, namely:

Reporter's Transcript:

P. 24—Cancel line 17, commencing with "A", through line 30; instead of lines 18-30 as designated by appellant.

P. 46—Omit lines 13-22 instead of lines 12-22.

P. 73—Include lines 23-25 instead of omitting them.

P. 128—Do not insert "not" before "did", as there is no justification for the change and the official transcript is correct as it stands.

HACKLEY & HURSH,
ROY C. HACKLEY, JR.,
JACK E. HURSH,

Attorneys for Appellee.

Receipt of a copy of the within designation of additional parts of the record to be printed is hereby acknowledged this 24th day of February, 1941.

BOYKEN, MOHLER & GORDON,
Attorneys for Appellant.

[Endorsed]: Filed Feb. 25, 1941. Paul P. O'Brien,
Clerk. [368]

[Title of Circuit Court of Appeals and Cause.]

ORDER REGARDING REPRODUCTION
OF EXHIBITS

Appellant having designated as part of the Transcript of Record on Appeal, the reproduction of the patents in suit, and certain prior art patents; and it having been represented that reproduction of the other paper and physical exhibits would be difficult and costly; and all the exhibits in this case having been transferred to this court where they may be inspected in original form;

It Is Hereby Ordered that appellant, as part of the Transcript of Record on appeal, reproduce and file at least five copies of the patents set forth in the designations of appellant and appellee, on file in this court, which shall be deemed a sufficient compliance with the rules of this court respecting reproduction of exhibits.

February 26, 1941.

CURTIS D. WILBUR,
United States Circuit Judge.

[Endorsed]: Filed Feb. 26, 1941. Paul P. O'Brien,
Clerk. [369]